Petition

81-901

No.

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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,

vs.

ELIZABETH E. WEIGAND,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Whether petitioner's motion for a change of venue should have been granted in light of the massive, prejudicial media coverage generated by the case in the St. Louis area which included allegations that this was a scheme tied to the Church of Scientology, and the fact that one of the alleged victims and a key witness against petitioner was her uncle, a United States Senator who was in the midst of a reelection campaign and who represented the District where the case was tried.

II.

Whether the trial court should have granted petitioner's motion for recusal under 28 U.S.C. §455(a) for the reason that a reasonable person might question the judge's impartiality because of newspaper publicity shortly before trial which reported the judge would be meeting with the key alleged victim in the case to seek funds for courthouse security which the judge felt was badly needed.

III.

Whether the manner in which the trial court conducted voir dire resulted in a deprivation of the petitioner's right to a fair trial for the following reasons:

A. The Court unduly restricted questioning regarding the pretrial publicity and politics to the extent that petitioner could not develop the requisite basis to support her request for change of venue; could not develop a sufficient basis to determine if challenges for cause were necessary; and could not garner sufficient information to intelligently exercise her peremptory challenges.

B. The Court needlessly advised each venireman that petitioner and her co-defendant had a relationship with the highly controversial Church of Scientology, even though that relationship was not material to the trial of the case.

IV.

Whether the trial court erred in admitting into evidence government Exhibit 27A, which contained an allegation of personal misconduct by the Senator, by failing to weigh the prejudicial impact of the exhib' against its limited evidentiary value, and further, by failing to consider the highly prejudicial manner of its presentation into evidence in allowing Senator Eagleton to read it to a jury composed of his constituents.

V.

Whether the trial court erred in giving an instruction on advice of counsel, in stating that "advice of counsel is not a defense", a statement which confused the jury and misstated the law.

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Elizabeth E. Weigand, your petitioner, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above-entitled cause on August 14, 1981.

OPINIONS BELOW

This case was decided by a panel of the United States Court of Appeals on August 14, 1981, in a majority opinion that has not yet been officially reported. A separate dissenting opinion was written by Chief Judge Lay. The opinions are reproduced as Appendix A hereto. On September 14, 1981, the Court overruled petitioner's petition for a rehearing or, in the alternative, for transfer to the Court en banc, Circuit Judge McMillian dissenting. (See Appendix B and Appendix C). No opinion was written and the order has not been officially published.

No orders or rulings entered by the District Court were written or officially reported.

JURISDICTION

The decision of the United States Court of Appeals affirming the District Court's conviction of petitioner and her co-defendant was rendered on August 14, 1981 (Appendix A). A timely petition for rehearing or, in the alternative, for a transfer (Appendix B) was denied on September 14, 1981 (Appendix C). Petitioner applied for a stay of the mandate in her case pending the application for a writ of certiorari to this Court; said application was granted on October 6, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISOINS, STATUTES, AND RULES OF COURT INVOLVED

United States Constitution

Amendment V

No person shall ... be deprived of life, liberty, or property, without due process of law ...

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ...

Statutes Of The United States

Title 18, United States Code

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

§ 875. Interstate communications

(d) Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both.

Title 28 United States Code

§ 455. Disqualificaton of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

* * *

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

* * *

Federal Rules Of Criminal Procedure

Rule 21. Transfer from the District for Trial

(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district.

* * *

Federal Rules Of Evidence

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

* * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Elizabeth E. Weigand, sometimes referred to herein as Libby, and Stephen Po.udniak were jointly charged and tried as defendants below. Count I of the indictment charged a violation of Title 18, United States Code, Section 875(d), extortion by a telephone call which threatened to injure the reputation of another; Count II charged a violation of Title 18, United States Code, Section 371, conspiracy. The alleged victims of the extortion and conspiracy were a corporation, Missouri Pipe Fittings Company, its managing director, J. J. Thyson who is a practicing lawyer, and its vice-president and treasurer, Thomas F. Eagleton, who is a United States Senator from Missouri. Senator Eagleton is an uncle of Elizabeth Weigand.

On the 3rd day of August, 1980, defendants were taken into custody by agents of the Federal Bureau of Investigation. The next day, Senator Thomas F. Eagleton, who was in the midst of a heated reelection campaign, called a press conference. At the press conference, he announced the arrest of his niece and her attorney and was quoted as saying:

> "It is obvious the Scientology connection is the important connection. . .My present feeling is one of compassion for my niece who has allowed the Church of Scientology to steal her mind and her soul and compassion for her parents, who have already suffered enough in their lives."
>
> *St. Louis Globe-Democrat,* August 5, 1980, p. 1A

Thereafter this case was the focus of extensive, widespread media coverage.

The indictment was filed on September 9, 1980, and the case was assigned to Chief Judge H. Kenneth Wangelin. Defendants timely filed their pretrial motions including a motion for change of venue, which addresses the first issue raised herein; and, a motion in limine relating to the substance of certain information, which relates to the fourth issued raised herein.

On September 22, 1981 defendants filed a motion for the Court to recuse and disqualify itself and all the judges of the Eastern District of Missouri, which is the second issue addressed herein, as a result of a newspaper article which appeared in the St. Louis Post Dispatch on Sunday. The motion was denied by Judge Wangelin on the day it was filed.

Pretrial Conference

On October 8, 1980, Judge Wangelin held a pretrial conference (PTr., 2). Among the items discussed was the method in which the Court would conduct voir dire examination, which relates to the third issue raised herein. Defendants objected to a general questioning of veniremen on the subject of the Church of Scientology (PTr. 3) and submitted proposed voir dire questions to the Court (PTr. 11) which are reproduced as Appendix D hereto. Defendants requested individualized and segregated questioning of the jurors on the issue of pretrial publicity so that the Court could inquire as to what they had read or heard about the case (PTr. 9-11). The Court refused to so inquire (PTr. 12). The Court also denied defendants' request that the jury be sequestered (PTr. 16-17).

Voir Dire Examination

The trial commenced as scheduled on October 14, 1980 (Tr. 2). Prior to the voir dire beginning, the defendants again requested a change of venue based upon recent media publicity (Tr. 4-5, 8) which was denied (Tr. 6, 8). The judge began by questioning the panel as a whole on the issue of pretrial publicity (Tr. 14-77). Thereafter all but three of the veniremen were questioned in chambers with counsel and defendants present but out of the hearing of the other jurors (Tr. 81-176).[1] The in-

[1] This procedure was the subject of this Court's ruling in *In Re: United States ex rel. The Pulitzer Publishing Company and Edward H. Kohn*, 635 F.2d 676 (8 Cir. 1980). No issue is presented on this appeal relative to the exclusion of the press during voir dire examination.

dividualized voir dire covered the subject of influence by the testimony of Senator Eagleton and bias toward the Church of Scientology. The examination of the jurors was then continued in open court after which a jury was selected (Tr. 178-206).

Trial

Testimony began on October 16, 1980. The testimony established that Missouri Pipe Fittings Company is a Missouri corporation which was established in 1957 (Tr. 240) and has always been in the Eagleton family. Currently, it is owned by Senator Eagleton (25%), his two children (12½% each), Dr. Mark Eagleton, Jr. (25%), and his four children, one of whom is petitioner (6¼% each) (Tr. 229).

On the 14th day of February, 1970, at a joint meeting of the directors and stockholders of Missouri Pipe Fittings Company, a restrictive stock agreement was adopted (Tr. 241, 276). The stock restrictions provide in part that forty percent of the income from Missouri Pipe is to be retained by the corporation as shareholder loans, that the taxes on the income be paid, and that there be a $6400 payment per year to each shareholder per 6¼% interest in the corporation (Tr. 312-13). The managing director of the corporation, J. J. Thyson, has discretion to make additonal payments to the shareholders up to the limits of their undistributed income (Tr. 226-27, 278, 329). The restrictions also provide that the stock can only be sold or transferred to a person of the Eagleton blood, back to the corporation, or to a third person with the consent of sixty percent of the shareholders (Tr. 220). The restrictions terminate on January 1 2001 (Tr. 229).

In November, 1973, Dr. Eagleton suffered a stroke which le him disabled (Tr. 340, 589, 783). Thereafter, his primary sour of income was Missouri Pipe Fittings Company (Tr. 347, 57 J. J. Thyson took over the financial management of D Eagleton's family (Tr. 351-52, 592, 595, 784, 816). The childre of Dr. Eagleton were generally told that their interest

Missouri Pipe was held for them in trust (Tr. 501-02). Over a period of time, his three older children, Mimi and David Eagleton and Libby Weigand, all sought additional information from Mr. Thyson in relation to their holdings, including a copy of the "trust" (Tr. 232, 270, 280, 793, 818-20, 861-62). Prior to January 1980, they were not given documents relative to Missouri Pipe (Tr. 270, 282, 745-46, 793, 820). There was a great deal of testimony regarding contacts Mimi, David and Libby had, in person, in writing, and on the telephone, with Mr. Thyson and Senator Eagleton in reference to their financial position and interest in Missouri Pipe Fittings Company (Tr. 385, 567, 569, 590, 599, 603-04, 606, 793, 818-23, 862-63).

Around the 1st of January, 1980, Mimi and Libby hired an attorney, Alan Steinberg, to obtain more information about their holdings in Missouri Pipe Fittings Company (Tr. 235, 238, 425, 740, 828). He wrote Mr. Thyson and was answered by William E. Buckley, who advised he was representing Mr. Thyson (Tr. 426, 742, 775). A few weeks later, on January 25, 1980, a meeting was held between Mr. Thyson, Senator Eagleton, Mimi, David and Libby. Senator Eagleton began the meeting by giving a brief history of the corporation (Tr. 239, 572, 801, 833, 867). The three children were given copies of the restricted stock agreement to review (Tr. 241, 349, 801, 834, 867). Mr. Thyson answered questions about the stock restrictions and their interest in the corporation (Tr. 242, 244, 349, 574, 611, 802, 834, 868). The value of their interests was discussed. At one point $90,000 was mentioned, and later, $125,000 was discussed (Tr. 244, 803, 835, 868-69). Mr. Thyson and Senator Eagleton testified that Mr. Thyson definitely stated that the company "ain't" buying the stock (Tr. 245, 574, 577). Mimi, David and Libby all testified that when they left the meeting, they were under the impression that the company would buy them out if they desired; it was only a matter of determining value (Tr. 803-04, 835, 869). When the meeting concluded, the children were told they could not take the copies of the minutes with them (Tr. 350-51). The reasons given were to keep the in-

formation from competitors, the union, and the Church of Scientology (Tr. 350-51, 383).

Mimi and Libby went back to see Alan Steinberg, who was later able to obtain a copy of the minutes through William Buckley (Tr. 316-19, 429-30, 751-52). On March 25, 1980, they had a conference where Steinberg advised them that it was a well-drafted document, that unless the company wanted to buy them out the only other way out was to demonstrate mismanagement on the part of Mr. Thyson (Tr. 755, 779, 871, 879). He told them that they could not afford to litigate with Missouri Pipe and that he did not have enough information at that point to place a value on their interest in the corporation (Tr. 756-57, 872).

During March, 1980, Libby asked a friend who was also a lawyer if he would review the documents that Alan Steinberg had (Tr. 626-27, 663, 765, 872). That friend was her later co-defendant Stephen Poludniak. He went to Steinberg's office with Libby and it was then determined that Steinberg would withdraw as her counsel and that Poludniak would represent Libby for the purpose of effectuating a buy-out of her interest in Missouri Pipe (Tr. 631-65).

On April 15, 1980, Poludniak wrote William Buckley advising that he wanted to review certain documents which would be used to make an offer for a buy-out of his client's interest in the company (Tr. 285, 290, 434, 632). As a result of his request Poludniak was allowed to see certain documents (Tr. 290, 434). The general procedure was that documents requested by Poludniak would be made available for him to review at Buckley's office (Tr. 515, 516, 639, 688).

On May 6, 1980, Poludniak wrote Buckley and offered a liquidation of Libby's interest in Missouri Pipe for $220,000 (Tr. 250, 292, 434-35, 511, 633-34). This figure included a sale of her 6¼% stock and an unconditional release of her shareholder loans, estimated at approximately $150,000 (Tr. 292, 322, 511,

877). In response, Buckley sent Poludniak a copy of a letter from Mr. Thyson which stated that the company would not buy her interest (Tr. 251-52, 436, 438-40, 512, 634-35). After that, Poludniak continued to request certain documents which were produced until June 27, 1980, at which time there was no further contact until July 25, 1980 (Tr. 444, 447, 670-71).

Shortly after July 1, 1980, Mimi Eagleton returned from a wedding in Key West, Florida (Tr. 837). While she was there she heard some gossip about her uncle, Thomas Eagleton, which she repeated to Libby involving an allegation that the Senator was bi-sexual (Tr. 838-39). Libby mentioned the gossip to Stephen Poludniak (Tr. 643-44, 680, 691, 713, 720).

About this same period of time Libby was trying to reach Senator Eagleton by telephone because she believed he exercised influence with Mr. Thyson on the Missouri Pipe affairs and she wanted his help in arranging a buy-out of her interest (Tr. 576, 616, 882). They finally talked on the telephone and the Senator became angry, told her he would not interfere with Mr. Thyson, and ended by slamming the phone down (Tr. 577, 617, 883-84).

Libby then wrote a note to her uncle dated July 10, 1980 (Tr. 577-79, 613, 885). Prior to sending the note she discussed with Stephen Poludniak whether she should make a reference to Key West, and it was agreed that she should (Tr. 692, 713-14, 885). There was no response to the note (Tr. 692).

Libby had plans to go to California for several weeks beginning in the middle of July. Prior to leaving, she met with Stephen Poludniak and discussed the situation with Missouri Pipe (Tr. 644, 671, 886). It was agreed that he would continue to represent her in trying to effectuate a buy-out. There were no discussions of the particular tactics he would use (Tr. 648, 671, 887). Between July 16 and August 1, 1980, they had no direct contact (Tr. 887-906).

On July 25, 1980, Poludniak called Buckley and said there were things he watned to discuss (Tr. 448, 696). He told Buckley

that Libby was in California and that she had hired investigators and they discovered a number of irregularities concerning the company, Senator Eagleton, and Mr. Thyson (Tr. 645-46, 696). He said that if Buckley did not want to talk about it, the media would (Tr. 646-47). Poludniak stated it was an election year and the material could be damaging (Tr. 448-49, 697).

Buckley and Poludniak met at Buckley's office on July 29, 1980. Poludniak gave him two letters regarding alleged irregularities in the corporation (Tr. 451-56, 517-19, 530). Poludniak again stated that Libby had hired investigators and that they came up with a number of things on Mr. Thyson and Senator Eagleton (Tr. 648-49). He said it was documented by photographs and other materials which would be of a tragic nature to the Senator. He also stated that Libby was adamant that if she was not bought out she would distribute the information. He mentioned Key West, Florida, and said Libby had documentation on that (Tr. 469). He told Buckley that although Mr. Thyson runs the company on paper, practically speaking the Senator has a voice in what goes on. The meeting was recorded by Buckley (Tr. 456). Following the meeting, after conferring with the Senator and Mr. Thyson, Buckley took the tape to the FBI (Tr. 254, 469). From that point on, the meetings and telephone conversations between Buckley, Poludniak and Thyson were recorded by the FBI, with the consent of Buckley and Thyson (Tr. 581).

On July 31, Poludniak called Buckley. He told him that he got the information from Libby and that it checked out. He said he set up a meeting with Roy Pfautch, who was the campaign manager for Senator Eagleton's opponent, and with John Spano, City Editor of the *St. Louis Globe-Democrat* (Tr. 539-41, 542-44, 649-50). He said Spano had to have the information by 2 o'clock on Sunday so that it could be placed in Monday's paper, the day before the primary election (Tr. 471-72). He agreed to meet Buckley later that afternoon and further discuss the situation.

They did meet later in the afternoon of July 31. Because the recording device malfunctioned and there was no tape of that meeting (Tr. 473), Mr. Buckley made written notes following the meeting (Tr. 473). During the meeting Buckley asked how much money Libby wanted, and the response was $220,000 (Tr. 474). He asked what terms there were for payment and the answer was cash (Tr. 474), and immediate and complete separation from the company with no strings (Tr. 475). He asked Libby's intentions as to what she was going to do with the money and Poludniak said he did not know, that she had once talked to him about a real estate investment, and that he was certain she would not tell her intentions to Mr. Thyson (Tr. 475). Mr. Buckley testified that he told Poludniak that the company was not interested in purchasing or buying out Libby's interest and that the only reason they were talking was because of the threats that were being made to go to the media and to the McNary campaign with damaging material about Senator Eagleton (Tr. 476). Poludniak excepted the use of the word "threat". When asked how he would characterize his actions, he smiled and said he preferred not to characterize them at all (Tr. 477). Buckley told him that he had mentioned Key West to Senator Eagleton and that it did not register (Tr. 477). Poludniak stated that he had examined the materials sent him by Libby and they appeared to be authentic and were damaging to the Senator, involving personal misconduct as well as misconduct in office (Tr. 478-79). He said that Libby was insistent that the buy-out be completed immediately or the materials would be released prior to the primary election (Tr. 480).

The next conversation between Buckley and Poludniak occurred on the morning of August 1 (Tr. 481). Buckley advised that they were conditionally willing to go along but there were a number of concerns which had to be worked out. Poludniak said that he would postpone the meeting with the Globe and they set up a meeting for later that afternoon.

During this period of time, Poludniak advised Libby's husband of the situation (Tr. 651, 673-74, 711). He told Scott

Weigand that Mr. Thyson would probably want to speak with Libby and that he should have her stand by in California for a telephone call on August 1 (Tr. 652-672). Scott Weigand questioned Poludniak as to whether what he was doing was legal and he was advised by Poludniak that it was perfectly legal (Tr. 652-54, 679).

At the meeting on the afternoon of August 1, Mr. Thyson was present along with Buckley and Poludniak (Tr. 255). They discussed whether Thyson and Buckley would be allowed to see the damaging materials prior to paying for them (Tr. 256). Poludniak advised that they would not (Tr. 256). They then placed a conference call to Libby in California (Tr. 258, 488, 657). Mr. Thyson spoke to Libby and told her it was not in accordance with the family plan for her to get $220,000 at the present time and that he was not going to buy her out unless it also involved the damaging material. (Tr. 259). In that conversation, Libby told Mr. Thyson that she did not want to destroy the Senator; she stated "I want what I want and I wanna get out and this is obviously the only way I can do it" (Tr. 889-91). She also confirmed that they also had information on Thyson and that that would be included with the materials. The three men later went to Mercantile Bank where a check for $220,000 was drawn made payable to Elizabeth Weigand (Tr. 261-63, 659).

On the morning of August 3, 1980, Libby returned from California. She and her husband went to Poludniak's office (Tr. 660, 678, 893). In addition, they agreed to include the photographs of the corporate documents that they had taken at Buckley's office. There was a conversation again where Poludniak was questioned regarding the legality of these actions, and he told both Libby and her husband that he had researched the issue and that he was convinced that what they were doing was proper (Tr. 661, 895). He then instructed Libby to write out three notes which could be included in the packet for the exchange of the money (Tr. 662, 678-79). One of the notes dealt with the bi-sexual allegation from Key West, Florida. All of the

items were packaged together in a manila envelope and placed in Poludniak's briefcase.

Later that day, Scott Weigand drove Libby and Poludniak to the Missouri Athletic Club in downtown St. Louis where they met with Mr. Thyson and Buckley (Tr. 496). This meeting wsa also recorded by FBI agents who were present in the area (Tr. 264). At the meeting, Buckley and Thyson refused to transfer the $220,000 check because Poludniak would not allow them to see the contents of the manila envelope (Tr. 265, 497-98). Poludniak and Libby then left the Missouri Athletic Club and it was at this point that they were apprehended by FBI agents (Tr. 498, 896).

The cause was submitted to the jury on October 24, 1980, after denial of motions for judgment of acquittal, argument and the Court's charge (Tr. 949-74) to which defendants made certain objections. Specifically, defendant Weigand objected to the government Instruction 20A and the Court's refusal to give her Instruction 20B relating to the defense of advice of counsel (Tr. 946-47), which is the fifth issue raised herein. The jury returned a verdict of guilty as to each count for each defendant (Tr. 974-75).

On December 5, 1980, defendants appeared before Judge Wangelin for sentencing (Tr. 979). Defendant Poludniak was sentenced to a term of imprisonment for four years on Count II of the indictment and imposition of sentence was suspended on Count I of the indictment; he was placed on probation for a period of three years commencing upon the completion of the sentence of imprisonment (Tr. 984).

Prior to imposing sentence of defendant Weigand, it was mentioned that a juror had contacted counsel after the verdict was returned (Tr. 986). A copy of that letter was provided the Court and counsel for the government and is incorporated as Appendix G herein. The Court found that there were reasonable grounds to believe that defendant Weigand would benefit from

treatment under the Youth Corrections Act and she was ordered committed to the custody of the Attorney General pursuant to Title 18, United States Code, Section 5010(b), until discharged by the United States Parole Commission as provided in 18 United States Code, Section 5017 (Tr. 989).

Following imposition of sentence, defendants duly filed their notices of appeal. The Eighth Circuit, on August 14, 1981, affirmed the convictions, with Chief Judge Lay dissenting. Defendants' motion for rehearing or transfer to the Court en banc was denied on September 14, 1981, with Judge McMillian dissenting from the en banc denial. Stephen Poludniak elected not to pursue the matter any further and the mandate of the Eighth Circuit was issued on September 22, 1981. The Court's mandate was stayed as to Elizabeth E. Weigand and this Petition follows.

REASONS FOR GRANTING THE WRIT

I.

Change of Venue

All of the judicial proceedings herein took place in the fall of 1980. It was an election year for Missouri Senator Thomas Eagleton, who was facing a serious contender. The arrest of the Senator's niece, Elizabeth Weigand, and her attorney, Stephen Poludniak, took place two days before the primary election, and the trial itself concluded less than two weeks before the hotly contested general election. Senator Eagleton was ultimately reelected by a narrow margin.

The trial of Elizabeth Weigand and her lawyer for their alleged extortion attempt presented, in the eyes of both the public and the press, a most unique and unusual case. Add to this the issue injected by the Senator, but never proven at trial, of the possible involvement of the Church of Scientology. Whether the massive publicity in all the media would have occurred had not Senator Eagleton held a press conference to announce the arrest is

unknown. But the tremendous interest in the case by the public and the press, before, during and after the trial, is demonstrated by petitioner's voluminous exhibits consisting of documentation of the number of stories on St. Louis' three major television stations, the transcriptions from a fourth, the two daily newspapers, and various radio stations. A further demonstration of public interest in the case was the Writ of Mandamus filed by the press to open up the voir dire proceedings. This Writ was ultimately granted by the Eighth Circuit in *In re: United States ex rel. The Pulitzer Publishing Company and Edward H. Kohn,* 635 F.2d 676 (8th Cir. 1980).

It is, and always was, the petitioner's position that because of the massive publicity surrounding this case, coupled with the preexisting sentiment in favor of Senator Eagleton, the fair and impartial jury guaranteed defendants by the Sixth Amendment could not possibly obtain, and the venue of the case should been removed. Petitioner cannot emphasize strongly enough the amount of publicity this case received, and the charged atmosphere prevalent in the St. Louis area before the trial as the story of "extortion by Senator Eagleton's niece and her lawyer" unfolded before the very interested public. When the members of the jury panel were ultimately questioned at voir dire, all were aware of Senator Eagleton and his upcoming election, and nearly all had seen, read and heard of the incident giving rise to the trial. Additionally, not only the members of the media, but the trial judge himself was aware of the impact the court proceedings were having on the very close election. (See remarks of trial judge Wangelin, Tr. 583).

The defendants were entitled to a trial by an impartial jury, untainted either by the position and prestige of the victim, or prejudice against the defendants and their possible church affiliations. At the time of the trial, Senator Eagleton was extremely popular in Missouri. He had been continually elected to statewide positions since 1960, and prior to that, had held public office in St. Louis. He was one of the few liberal Democratic

senators who successfully resisted the conservative Reagan tide on election date. Through adept use of the media, Senator Eagleton maligned the Church of Scientology, then associated the defendants with the institution. In light of the massive publicity attending the case, coupled with the status of the victim, the petitioner could not be guaranteed a fair trial in the Eastern District of Missouri, or anywhere in the State represented by Senator Eagleton in Congress.

A remedy for such circumstances exists in Federal rule of Criminal Procedure 21(a) which provides for transfer if "there exists in the district where the prosecution is pending so great a prejudice against defendant that he cannot obtain a fair and impartial trial." Under this rule and under the United States Constitution, the trial judge has a duty to insure that a defendant receives a fair and impartial trial. Sixth Amendment and *United States* v. *Marcello,* 423 F.2d 993 (5th Cir. 1970). The defendants were entitled to a fair trial, not only free from prejudice, but free from the probability of prejudice. *Estes* v. *Texas,* 381 U.S. 532 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966).

The Court of Appeals stated that it was not an abuse of discretion for the trial court to refuse to rule on the petitioner's transfer motion until after voir dire. It cited *United States* v. *Brown,* 540 F.2d 364, 378 (8th Cir. 1976); however, *Brown* presented a very different case than was presented in the instant case: only seventeen of the 44 members of the jury panel in *Brown* has been exposed to any of the pretrial publicity surrounding the prosecution, 540 F.2d at 378. The Court of Appeals in *Brown* noted that a "more pervasive atmosphere of prejudicial publicity" might warrant resort to different procedures. 540 F.2d at 379.

The Fourth Circuit in *Wansley* v. *Slayton,* 487 F.2d 90 (4th Cir. 1973) noted that to warrant a change of venue under Rule 21(a), the alleged pretrial prejudicial publicity must have been recent, widespread, and highly damaging to the defendant. The Court went on to cite several Supreme Court cases where such

was found: *Irvin* v. *Dowd,* 366 U.S. 717 (1961), where the barrage of newspaper headlines and articles created a "influence permeating the community", and thus the defendant should have been entitled to a change of venue, and *Sheppard* v. *Maxwell, supra,* where the massive prejudicial publicity continued through the trial itself. In the present case, the publicity started the day the defendants were arrested. The barrage of publicity continued right up to and through the trial two and a half months later. Federal courts have recognized that there are times when an avalanche of adverse publicity may so clearly raise a presumption of prejudice that it is unnecessary to postpone determination of change of venue until the voir dire. *United States* v. *Engleman,* 489 F. Supp. 48 (E.D. Mo. 1980); *United States* v. *Marcello,* 280 F. Supp. 510 (E.D. La. 1968).

The media coverage of the Eagleton extortion trial saturated the St. Louis area. There were many photographs of Senator Eagleton, the defendants, and some of the officials with the Church of Scientology.

At trial of petitioner and her co-defendant, a key witness against the two was the Senator. On several factual issues, it came down to whom to believe: the Senator, or his nieces and nephew. As Chief Judge Lay said in his dissent:

> ". . . Each of the potential jurors belonging to the general electorate had undoubtedly formed before the trial a personal impression of Senator Eagleton based upon the Senator's many years of service to Missouri. In my judgment, it was clear error for the trial court to assume that potential jurors could fully set aside these impressions in a trial where the Senator was a central figure. Such an assumption is totally unrealistic. This case involved the Senator's reputation for truth and veracity as much as it did the defendants' . . ." p. 27.

Under the circumstances of this case and its unusually high media coverage, a trial free from the probability of prejudice

could not be guaranteed in the St. Louis area. In view of the nature, frequency and timing of the media coverage involved, and the federal court decisions that support a change of venue in circumstances such as those presented by this case, the District Court's refusal to grant a change of venue under Federal Rule of Criminal Procedure 21(a) was an abuse of discretion warranting reversal and a new trial.

II.

Recusal

Petitioner submits that U.S. District Judge H. Kenneth Wangelin should have disqualified himself from the trial of this case because pursuant to 28 U.S.C. 455(a), "his impartiality might reasonably be quetioned" following the publication during pretrial proceedings of a newspaper article reporting that Judge Wangelin hoped to meet with the victim of this alleged crime (Missouri Senator Thomas Eagleton) to request money for increased security at the federal building in St. Louis.

On Sunday, September 21, 1980, three weeks before the trial of this case, the *St. Louis Post-Dispatch* published two stories on the same page pertinent to this petition. The first was a 1000-word article with a bold front headline, clearly identified as relating to the "Eagleton Extortion Case". The story, primarily discussing the defense motion for a change of venue, pointed out that Judge Wangelin had charge of the proceedings, and that Senator Eagleton was the victim of this alleged attempted extortion. This was one of the continuing series of articles which appeared daily in the media. The second article, printed immediately below the first, advised of recent security problems at the federal courthouse, and the solutions proposed by Chief District Judge H. Kenneth Wangelin. One such proposal was more guards. The second-last paragraph of the second article read as follows:

> "Wangelin said he hopes to talk to Missouri's U.S. senators this week to see whether he can get money to hire more marshals. 'God only knows that we need them', he said."

Thus, on the same page of the paper was an article reporting that Judge Wangelin presided over the trial of the case in which Senator Eagleton was the victim, and an article reporting that Judge Wangelin hoped to speak to Senator Eagleton to get money for the security of his courthouse. In one breath, the public was thereby advised that Judge Wangelin had some control over the trial of Eagleton's case, while Eagleton may have some control over the security and safety of Judge Wangelin's courtroom.

The day after these articles appeared, defense counsel moved for disqualification of Judge Wangelin and all other district court judges for the Eastern District of Missouri. The motion was denied by Judge Wangelin the day it was filed. Petitioner contends that Judge Wangelin should have disqualified himself because under the circumstances, a reasonable person might reasonably question his impartiality, and thus he should have followed the mandate of Title 28, Section 455(a), which provides:

> "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

The Seventh Circuit discussed the legislative history of Section 455 in *SCA Services, Inc.* v. *Morgan*, 557 F.2d 110, 13 (1977). In 1972, the House of Delegates of the American Bar Association adopted a new code of judicial conduct which advocated the "appearance of justice" standard for judicial disqualification. *See*, ABA, Code of Judicial Conduct, Canon 3C. In 1974, Congress enacted the present Section 455 which was designed to reconcile the ABA code with the federal statutes. Prior to the 1974 revision, Section 455 required that a judge

recuse himself under circumstances such ". . . as to render it improper, in his opinion, for him to sit on the trial . . ." Congress enacted the new section to substitute an objective test of reasonableness for the subjective test of the former Section 455. *United States* v. *Ritter*, 540 F.2d 459 (10th Cir. 1976). According to the report of the House Judiciary Committee, the general standard of revised Section 455(a) was designed to promote the public's confidence in the impartiality and integrity of the judicial process by stating that if there is any reasonable factual basis for doubting the judge's impartiality, the judge "shall" disqualify himself. 1974 U.S. Code Cong. and Admin. News, pp. 6351, 6354-55.

The goal of the judicial disqualification statute is to foster the appearance of impartiality. *Potashnick* v. *Port City Construction Company*, 609 F.2d 1101, 1111 (5th Cir. 1980). The appearance of impartiality is more important than the fact of impartiality. The language of Section 455(a) removes the so-called "duty to sit", *Rice* v. *McKenzie*, 581 F.2d 114 (4th Cir. 1978), and requires a judge to exercise his discretion in favor of disqualification if he has any question about the propriety of his sitting in a particular case.

In ruling on this issue, it was the holding of the Court of Appeals that a reasonable person, knowing all the circumstances, would not conclude that Judge Wangelin appeared to be partial to the Senator and his participation in the case against the petitioner. But that misstates the issue; the inquiry should have been whether a reasonable person taking at *face value* an article about the present case referring to Judge Wangelin as the trial judge and Senator Eagleton as the victim, with immediately below, an article that this same judge would be contacting this same victim for financial assistance within the same time frame as the trial, might harbor doubts about that judge's partiality in sitting on the case. Put another way, the standard is simply, whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of these articles.

Sensitivity to the public's confidence is warranted in a case such as this which received such widespread press coverage, and especially where the public's awareness of the pretrial and trial proceedings was heightened by the election ahead. The circumstances of potential mutual benefit between Judge Wangelin and Senator Eagleton, coupled with the report to the public of the impending meeting between the two, whether or not it ever occurred, created "an impression of private consultation and appearance of partiality", *SCA Services, Inc.*, v. *Morgan, supra* at 116, and may have conveyed to the public that the Senator was in a special position to influence the judge. *In re Virginia Electric and Power Company*, 539 F.2d 357, 369 (4th Cir. 1976). Petitioner is not questioning the integrity or sincerity of the district court judge. But "[T]he inquiry begins and ends with a determination whether a reasonable person would have had a reasonable basis for doubting the judge's impartiality." *Rice* v. *McKenzie, supra* at 1117. Judge Wangelin's refusal to disqualify himself was contrary to the requirements of the federal statute as interpreted by the federal courts, and was therefore an abuse of discretion necessitating reversal.

III.

Voir Dire

Petitioner contends that the limited voir dire inquiry did not provide sufficient information to develop challenges for cause or to allow her to intelligently exercise her peremptory challenges. The Court's refusal to extend voir dire on the impact of the pretrial publicity, combined with the special situation presented by the status of Senator Eagleton, prevented effective voir dire and resulted in a denial of the petitioner's constitutional right to a fair trial.

A. Pretrial Publicity

Voir dire is one of the most important safeguard of a defendant's right to a trial free from the prejudicial effects of

detrimental publicity. Voir dire can be used to ascertain whether perspective jurors were actually influenced by pretrial publicity. However, to then limit the scope of the jurors' examination to a subjective response as to whether that juror feels he/she can set aside pretrial publicity and be impartial, as was done here, is patently unfair. Given the amount and substance of the publicity in this case as discussed in Point I of this petition, *supra*, the need for an extended and probing voir dire of the jury panel was even more pressing.

Of the fifty persons questioned on the issue of pretrial publicity, only three members of the panel claimed to have no pretrial knowledge of the case through the media. Wanting to discover the impact of this publicity on the jury panel, the defendant proposed a series of questions for use during voir dire (Appendix D). Included was the question, "What have you heard or read about this case?" The district court specifically refused to ask any of the panel members the contents of what he/she had read and heard about the case. Petitioner contends that without knowing the content of what the jurors were exposed to, neither the court nor the parties could realistically determine the impact of the publicity. Although the veniremen were asked about the source of their exposure to media coverage, (often a combination of radio, television, and newspapers), the amount of coverage they were exposed to, (for many it was multiple), and if they had engaged in discussions about the case (quite a few had), only one question mattered in the decision of the trial judge to excuse a juror for cause: whether that juror could set aside the publicity and decide the case solely on the evidence presented. Thus, the trial court was not making an independent determination of the jurors' partiality, as he is required to do, but relying instead on the juror's own evaluation of his ability to judge the case. *United States* v. *Davis*, 583 F.2d 190, 197 (5th Cir. 1978).

In *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968), the defendant contended that the trial court's voir dire examina-

tion was inadequate to protect him from the probability of prejudice. The Court began its analysis by quoting the caveat of *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966):

> "Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to insure that the balance is never weighed against the accused."

To this the Court in *Silverthorne* added its conclusion:

> "Therefore, when pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might to tend to defeat or impair the rights of an accused. *The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered."* [Emphasis added.]

The questions used by the court in *Silverthorne's* trial are set out in the margin of the opinion. They are nearly the same as those used in the instant case. In ordering a new trial, the Ninth Circuit found that these questions were inadequate because they were calculated to evoke responses which were subjective in nature, i.e., the jurors were called upon to assess their own impartiality for the court's benefit; and, the entire voir dire examination was too general to adequately probe the prejudice issue. What was found to be objectionable in *Silverthorne* was that in its questioning, the trial court "made no effort to ascertain *what* information the jurors had accumulated, and consequently, had no way of objectively assessing the impact caused by this pretrial knowledge on the jurors' impartiality." [Emphasis original.] 400 F.2d at 638.

The petitioner contends that the same situation obtains in the instant case. The district court carefully directed each venireman not to disclose the contents of what he or she had

read or heard. Rather, it was satisfied with each juror's own determination that everything heard and read could be put aside.

Silverthorne was cited with approval by the Seventh Circuit in *United States* v. *Dellinger,* 472 F.2d 340 (7th Cir. 1972). In reversing the case for failure of the trial court to adequately protect the defendants from the barrage of pretrial publicity, the Court stated:

> "Natural human pride would suggest a negative answer to whether there was a reason the juror could not be fair and impartial. A juror might well answer negatively, in good faith, without stopping to consider the significance or firmness of impressions he might have gained from news reports." 472 F.2d at 375.

The Eighth Circuit in passing on this case was of the opinion that the 197 pages of voir dire was adequate. In *Irvin* v. *Dowd,* 366 U.S. 717 (1961), this Court found denial of a second change of venue a basis for granting federal habeas corpus relief. The State's position was that the 2783 pages of voir dire were adequate in that the result was a panel of jurors qualified to sit for each had indicated he could render an impartial verdict. But the Court found that the nature of the case and the barrage of publicity on it had caused an "influence permeating the community" which was so persistent that it "unconsciously fights detachment from the mental process of the average man", and it would be difficult to say that each juror would be able to exclude that influence from his deliberation. 366 U.S. at 727. In other words, the voir dire was inadequate because all it did was extract each juror's subjective opinion that he could be impartial, and in light of the nature of the case and the massive publicity attending it, that opinion was insufficient to guarantee the defendant a fair trial.

The law has placed upon the petitioner the burden of demonstrating not only the extent of the pretrial publicity, but

the probability of its prejudicial impact on the prospective jurors. Petitioner was denied the opportunity to make this requisite showing when the district court refused inquiry into the substance of what the veniremen had read and heard. In doing so, the district court took from petitioner her most effective tool in exposing presentiment of the jury. Since Judge Wangelin had already denied the request for a change of venue, these restrictions on voir dire violated the petitioner's rights to due process of law, protected by the Fifth Amendment, and the right to a fair and impartial jury, guaranteed by the Sixth Amendment.

B. Politics

Although there was limited voir dire on the questions of the veniremen's political affiliations, and the additional credibility, if any, jurors would give to Senator Eagleton's testimony, as with the publicity issue, these questions amounted to no more than soliciting each juror's opinion that he/she could set aside past impressions from the Senator's more than 21 years of public office holding in this State. The trial court refused to ask further questions on voir dire as proposed by petitioner regarding such subjects as past political contributions and voting records. (Appendix D).

The Court of Appeals, in ruling on this case, was of the opinion that those influenced favorably by Senator Eagleton might be balanced out by those potential veniremen who disliked him. But a defendant is entitled to 12 fair and impartial jurors, not four who are biased against here, three who are biased in her favor, and five neutral jurors. As was stated in Chief Judge Lay's dissent, it was unrealistic for the trial court to assume that these potential jurors could set aside their past impressions in a trial where the senator was a key witness, and where his credibility as opposed to that of his nieces and newphew was at issue. (See Appendix A, p. 27) The special situation presented by these circumstances, coupled with the limited nature of the voir dire, resulted in a denial of petitioner's Sixth Amendment right to a fair trial.

In this case, the status of the victim, as well as the flood of publicity attending the case, were both pervasive influences permeating the community. *Irwin* v. *Dowd, supra.* As the Court noted on p. 20 of its opinion, the trial court had a duty to neutralize the effect of any known prejudice and to insure the defendants received a fair trial, *United States* v. *Bear Runner,* 502 F.2d 908 (8th Cir. 1974). If the trial judge was going to use voir dire only to extract promises of neutrality from the jurors, despite the influences he knew existed in the community which endangered the petitioner's right to a fair trial, then he should have granted a change of venue before even attempting voir dire, as was done in *United States* v. *Engleman,* 489 F.Supp 48 (E.D. Mo. 1980); and *United States* v. *Marcello,* 280 F.Supp. 510 (E.D. La. 1968).

C. Church Of Scientology

One of the initial problems the petitioner and her co-defendant faced in this case was the constant stream of pretrial publicity linking their efforts to liquidate petitioner's interest in Missouri Pipe Fitting Company to the Church of Scientology. In the Senator's very first press conference which he held to announce the arrest of petitioner and her co-defendant, he is quoted as saying:

> ". . .Libby, her husband, her sister, and Poludniak, all were members of the Church of Scientology. 'Libby has been and still is heavily influenced by this group,' Eagleton said.
>
> * * *
>
> ". . . [t]he main reason for refusing the purchase was his belief that the money would be turned over to the Church of Scientology, 'whose activities are well-known and documented'.
>
> * * *

". . .He said he hoped that his niece could 'free herself from her involvement with the scientology group which, in my opinion, has caused her this great trouble.'

" 'My present feeling is one of compassion for my niece who has allowed the Church of Scientology to steal her mind and her soul. . .' " St. Louis Post-Dispatch, August 4, 1980.

The publicity involving the Church continued unabated throughout the pretrial and trial proceedings.

During the pretrial conference, petitioner objected to the trial court's inquiry of the jury panel as to the Church of Scientology. There had previously been filed on behalf of the defendant a pretrial motion in limine to prohibit comments regarding the Church. The proposed voir dire questions tendered by petitioner regarding the involvement of the Church were only to be asked if the Church were brought up by a venireman in response to a proposed question, "what have you heard or read about this case?" (Appendix D).

However, the district judge instead chose to inject the Church of Scientology into the case by directly questioning the jury panel in voir dire in an individualized and segregated manner on the issue of the Church. In his questioning, he told the veniremen that the petitioner and her co-defendant were members of the Church of Scientology, and asked them if they had any feelings for or against the Church of Scientology, its teachings, philosophy, or its members. (See Tr., p. 83, for examples).

The effect of the Court's questioning was thus to inject in this case an issue that would have otherwise been inadmissible at trial. The Appellate Court was of the opinion that had the trial court not questioned in this area, the defendants would have had a claim of error on appeal. However, had the trial court instead followed the petitoner's request not to mention the Church of Scientology unless a juror brought up the subject in

answer to a question, then there would be no basis for a claim of error. The court itself should not be instrumentality which "skews the representative nature of a jury by permitting the injection of considerations irrelevant to a 'guilty' or 'not guilty' determination." *Grigsby* v. *Mabry,* 483 F.Supp. 1372 (E.D. Ark. 1980), at 1378.

The trial court during voir dire told each potential juror that the petitioner and her co-defendant were either past or present members of the Church of Scientology. At the very least, the Church is highly controversial. If Senator Eagleton's pretrial statements were to be believed, it is also dangerous. Whatever the relationship of the petitioner to the Church, it was not material or relevant to the trial of this lawsuit. As a result, petitioner's Fifth Amendment right to due process of law, and Sixth Amendment right to a fair and impartial jury were violated.

IV.

Admission Of Prejudicial, Inflammatory Evidence In A Prejudicial, Inflammatory Manner

Both prior to and during the trial, the petitioner filed a motion in limine relating to the contents of the handwritten notes seized on August 3, 1980, from the briefcase of her co-defendant, Stephen Poludniak. Petitioner contends that the contents of the notes were irrelevant to the issues in this case: since the substance of the crimes charged was the threats, coupled with the intent to extort, it was not necessary for the government to introduce the notes. In addition, the offenses charged were alleged to have been committed before the notes were even written. Thus, the admission of the notes in evidence violated Rule 402 of the Federal Rules of Evidence. The petitoner also asserted that besides being irrelevant, the contents of these notes, especially Exhibit 27A, were highly inflammatory, and any possible probative value they might have was outweighed by the potential for unfair prejudice to the defendant, Federal Rule of Evidence 403.

The defendants stipulated that petitioner wrote the notes (Tr. 554), and that stipulation was read to the jury (Tr. 549). The government in claiming the relevancy of the evidence, as well as the trial court, failed to address the balancing test mandated by Rule 403 of the Federal Rules of Evidence: the probative value of the evidence must not be outweighed by the danger of unfair prejudice, or the evidence is inadmissible. *See, United States* v. *Walls,* 577 F.2d 690 (9th Cir. 1978); *United States* v. *Beechum,* 582 F.2d 898 (5th Cir. 1978).

The notes did not constitute "similar act" evidence under Federal Rule of Evidence 404(b) which could be introduced to prove the defendant's intent. The "similar act" notion of Federal Rule of Evidence 404(b) is subject to the limits of Federal Rule of Evidence 403. The evidence which might arguably be relevant is admissible only if its probative value outweighs its potential prejudice. *United States* v. *Leonard,* 524 F.2d 1076 (2nd Cir. 1975). The process of evaluating the probity and prejudice of a particular piece of evidence includes considerations of how strong a tendency the evidence has to prove an issue of consequence in the case, and the proponent's need for the evidence. *See, United States* v. *Grassi,* 602 F.2d 1192 (5th Cir. 1979), and cases cited thereon. The stipulation by defendants forms a part of the Rule 403 weighing of probity and prejudice, with special attention on the prosecutorial need for the evidence in light of the stipulation, *United States* v. *Grassi, supra* at 1196; *United States* v. *Spletzer,* 535 F.2d 950 (5th Cir. 1976).

In the balancing process, "unfair prejudice" does not refer to the detrimental effects the evidence might have on the party's case, but it means an "undue tendency to suggest [a] decision on an improper basis, commonly, though not necessarily, an emotional one." *United States* v. *Grassi, supra* at 1197, citing Notes of the Advisory Committee on Proposed Federal Rules of Evidence, 28 U.S.C.A. Rule 403 at 102. In the present case, the evidence in question, government's Exhibit 27(a) was of

disputed relevance and questionable probative value: it was highly inflammatory in nature in that it alleged that the senior United States Senator from the State of Missouri, who was the duly elected representative of all the jurors, was bi-sexual, and it was read to those jurors by that Senator.

In direct violation of Rule 403, the trial judge failed to balance the danger of unfair prejudice by this presentation of the note. The Court never considered that the potential prejudicial impact of the evidence might outweigh its probative value. The trial court ruled the evidence admissible because it went to "intent" (Tr. 562), and the Court of Appeals found the notes admissible as an "integral part of the scheme", despite the fact that the note was written after the alleged crime was committed, that the contents were never revealed to the victims until after the defendants' arrests, and while failing to balance probity and prejudice as required by Federal Rule of Evidence 403.

Further, both the trial and the appellate courts, refused to consider the prejudicial manner in which this evidence was presented. If "similar act" evidence is to be admitted, its manner of presentation also must not be so prejudicial as to outweigh its probative value. *United States* v. *Belle,* 516 F.2d 578 (8th Cir. 1975). The notes were presented in the most prejudicial manner possible: by Senator Eagleton reading them aloud to a jury composed of his constituents (Tr. 584-87), even though the notes had never left possession until after their arrest; none of the victims had ever seen them; and Senator Eagleton never had the notes prior to their being handed to him by the government's attorney. The Court took *no* steps to minimize, let alone eliminate, the possibility of potential prejudice when the Senator testified and read these notes aloud to the jury. The trial judge's basis for allowing Senator Eagleton to read the notes was not the result of a Rule 403 balance, but was concern for the Senator's political situation (Tr. 583-84), a concern that has no place in a Rule 403(b) balance and which could only serve to inflame and prejudice the jury.

V.

Advice Of Counsel Instruction

The key to petitioner's defense at trial was that she believed, on advice of counsel, that she was acting legally. Since the alleged offenses were ones in which willful actions were essential elements, and since the conduct at issue (sale of interest in a closely-held corporation with a restrictive stock agreement) involved substantial legal problems requiring legal advice, an advice of counsel instruction to the jury was warranted.

At the close of the trial of this case, both the government and petitioner offered instructions on defendant Weigand's reliance on advice of counsel. The trial court rejected the instruction tendered by petitioner, and gave the one offered by the government (Tr. 933-35, 946-47).

The refused instruction, which was tailored from the pattern instruction in *Devitt & Blackmar,* 3d Edition, Section 14.12, is set out in Appendix E. The instruction given by the Court began with a paragraph which petitioner claims was misleading, confusing, contrary to her position instruction, and an improper statement of the law as it applies to the case. The instruction stated in part:

> "*Advice of counsel is not a defense to the crimes of conspiracy or extortion.* It is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked specific intent to violate the law." [Emphasis added].[2]

Petitioner submits that to tell the jury reliance on advice of counsel can negate a required element which the government must prove, specific intent, but yet is not a defense, cannot be correct.

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[2] The instruction in its entirety is set out in Appendix F.

Reliance on advice of counsel as a defense has long been recognized. In *Williamson* v. *United States,* 207 U.S. 425, 453 (1908), this Court set forth the same principles as stated in the *Devitt & Blackmar* instruction and petitioner's proposed instruction. The instruction offered by the petitioner is also very similar to an instruction approved by the Fifth Circuit in *United States* v. *Bush,* 599 F.2d 72, 79 (5th Cir. 1979). In that case, the trial court slightly tailored the instruction to conform to the facts of the case, much as petitioner did in the instant case.

Although many federal cases discuss the concept of the advice of counsel instruction, *see, e.g. Tarvestad* v. *United States,* 418 F.2d 1043 (8th Cir. 1979); and *United States* v. *Vannelli,* 595 F.2d 402 (8th Cir. 1979), petitioner has found only one case which addresses the use of the paragraph object to in the instant case. In *United States* v. *Taxe,* 540 F.2d 961, 969 (9th Cir. 1976), the Court without giving any substantial reasons, approved this language. Petitioner submits that this decision is erroneous and should be overruled.

The Eighth Circuit, in passing on this issue in the case at bar, stated that the offending paragraph referred to was just "a shorthand statement of the acknowledged rule of law that advice of counsel cannot be a defense to a willful and knowing violation of law." While to an attorney at law, this might be a "shorthand statement" of an acknowledged rule of law, petitioner submits that a lay person hearing once this long and involved instruction could easily have been confused. A lay juror might easily have believed from the evidence that the petitioner did not act willfully and knowingly due to her good faith reliance on the advice of her attorney, but since "advice of counsel is no defense", disregarded that factor in deliberating on the case. The purpose of the instruction was to inform the jurors that if a defendant knowingly and willfully violated a law, the additional factor that an attorney advised them to do so is irrelevant as a defense. But that rule is not what a lay person could easily have gleaned from hearing the trial court read the

long and convoluted instruction. Is it any wonder that a juror would be confused and write ". . .it is possible that in the two or three days from the phone call to California until the meeting at the Missouri Athletic Club that she *did not* realize that she was committing a crime." (Appendix G).

Petitioner's co-defendant testified that she had hired him to effect a buy-out of her interest in Missouri Pipe Fittings, and that she acted strictly in accordance with his advice. The government conceded that the course of conduct followed by petitioner and her co-defendant was completely legitimate up to July 25 (Tr. 934). Thereafter, while petitioner was in California, and not communicating with her co-defendant, co-defendant concocted and began to carry out a scheme which he told his client he had researched and was legal, and he then told her what to do. The instruction on advice of counsel was crucial to petitioner's case, and the misleading language of the advice of counsel instruction not only denied her a fair trial in violation of her constitutional rights, but also did away with the essence of her defense.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Nos. 80-2133 and 80-2134

Appeals from the United States District Court for the Eastern District of Missouri.

No. 80-2133

United States of America,
Appellee,

v.

Stephen Poludniak,
Appellant.

No. 80-2134

United States of America,
Appellee,

v.

Elizabeth E. Weigand,
Appellant.

Submitted: May 20, 1981

Filed: August 14, 1981

Before LAY, Chief Judge, ROSS and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

This is an appeal by Stephen Poludniak and Elizabeth E. Weigand, who were jointly charged and tried as defendants in the District Court.[1] The two-count indictment charged, in Count I, a violation of 18 U.S.C. §875(d), extortion by a telephone call which threatens to injure the reputation of another, and, in Count II, a violation of 18 U.S.C. §371, conspiracy to commit an offense against the United States. The alleged victims of the extortion and conspiracy were a corporation, Missouri Pipefittings Company, its managing director, J.J. Thyson, and its vice-president and treasurer, Thomas F. Eagleton, a United States Senator from Missouri. Defendant Weigand is Senator Eagleton's niece. For the reasons discussed below we affirm the judgment of the District Court.

Missouri Pipefittings Corporation is a Missouri corporation. After Mark Eagleton, Sr.'s, death, his two sons, Dr. Mark Eagleton, Jr., and Thomas F. Eagleton owned the company in equal shares. In February of 1970 they entered into a restrictive stock agreement providing that the stock can be sold or transferred only to a person of the Eagleton blood, back to the

[1] The Honorable H. Kenneth Wangelin, Chief Judge, United States District Court for the Eastern District of Missouri.

corporation, or to a third person with the consent of 60% of the shareholders. The agreement further provided that 40% of the income from Missouri Pipefittings is to be retained by the corporation as "shareholder loans," that the taxes on the income will be paid by the corporation, and that there will be a $6,400 payment per year to each shareholder per 6¼% interest in the corporation. The restrictions are to terminate on January 1, 2001.

After the adoption of the restrictive stock agreement, gifts of stock were made to the children of Dr. Mark Eagleton and Thomas Eagleton. Distribution of corporate income to the stockholders is handled by J.J. Thyson, the managing director of the corporation. Each of Dr. Eagleton's children received $6,400 a year from the corporation.

Several times over the next few years the older Eagleton children attempted to learn more about their interest. They generally believed that they were beneficiaries of a trust. Over a period of time, the three older children, Mimi and David Eagleton and Elizabeth (Libby) Weigand, all sought information from Mr. Thyson and also from Senator Eagleton about their holdings, including a copy of the "trust." A meeting was arranged for January 14, 1980, between the children and Mr. Thyson and Senator Eagleton. At that meeting, Senator Eagleton first explained the history of the company, including the 1970 agreement to restrict transfers of stock outside the family. The children were given copies of the restricted stock agreement to review, and Mr. Thyson answered their questions about the agreement.

Soon after this meeting, Libby Weigand hired Alan Steinberg, an attorney, to represent her in her attempt to sell her stock. After obtaining a copy of the agreement and other documents, Steinberg advised Libby that it was a well-drafted document, that unless the company wanted to buy her out the only way to get her money was to demonstrate mismanagement

on the part of Thyson, that the litigation would be expensive, and that he did not have enough information to put a value on her stock. He told her she had a "good deal" and should keep it. During March 1980, Libby asked another lawyer, Stephen Poludniak, to review the document. Steinberg withdrew as Libby's counsel, and Poludniak began representing her. During April Poludniak, accompanied by Ms. Weigand, made several visits to the office of William Buckley, the lawyer representing Thyson in the disagreement with Ms. Weigand over the stock. During these visits they were allowed to read many corporate documents and made copies of some of them.

On May 6, 1980, Poludniak wrote to Buckley and offered a liquidation of Libby's interest in Missouri Pipefittings for $220,000. This figure included a sale of her 6¼% interest and an unconditional release of her shareholder loans, estimated at approximately $150,000.[2] In response, Mr. Buckley sent a letter from Mr. Thyson stating that the company would not buy her interest. After that, Poludniak continued to request and receive documents until June 27, 1980. From that date there was no further contact until July 25, 1980.

In early July Mimi Eagleton returned from a wedding in Florida and told Libby that she had heard some gossip about their uncle, Senator Eagleton, involving his conduct during trips to Florida. Libby testified that the gossip struck her as "wild, preposterous, and ridiculous" and that she did not know whether it was true or false. She told Stephen Poludniak about the gossip.

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[2] The "shareholder loans" were actually corporate income reinvested in the corporation at the rate of 40% per year as required by the restrictive stock agreement. Mr. Thyson had discretionary power to make additional distributions to the children from undistributed income. He had done so from time to time for college tuition and other expenses.

At about the same time, Libby attempted several times to contact her uncle, Senator Eagleton, by telephone. When they finally talked, the Senator told her he would not interfere with Mr. Thyson's decision on the stock sale. He testified that he had not wanted to talk to her because she already knew his position on the subject, and there was nothing more to be said.

Libby then wrote a note to her uncle dated July 10, 1980, which was conciliatory in tone but contained a veiled reference to the gossip Mimi had heard in Florida. Libby consulted Poludniak before putting in the reference to Florida, and they decided to include it to see if it "got a rise" out of the Senator.

On July 16, 1980, Libby left for a trip to California, and she and Poludniak testified at trial that they agreed that he would continue to represent her in the Missouri Pipefittings matter and do what he could. They both testified that they had no direct contact with each other between July 16, 1980, and August 1, 1980. On July 25, Poludniak called Buckley and told him that Libby had hired investigators in California and had uncovered irregularities concerning the company, Senator Eagleton, and Mr. Thyson. He said that if Buckley did not want to talk to him about it, the media would. Poludniak mentioned that it was an election year, and that the information could be damaging. Poludniak and Buckley met at Buckley's office on July 29, 1980. Buckley recorded the meeting. Poludniak again mentioned corporate irregularities, and said also that Libby had documented evidence about the Senator's activities in Florida. After consulting with Mr. Thyson and Senator Eagleton, Buckley called the F.B.I. Subsequent conversations were recorded by F.B.I. agents.

On July 31, Poludniak called Buckley and reported that he had received the information from Libby in California and that it was very damaging to the Senator. He also reported that he had made appointments to release the information to Roy Pfautch, campaign director for Senator Eagleton's opponent,

and John Spano, the City Editor of the *St. Louis Globe-Democrat*. Defendants' testimony at trial was that a number of statements made by Poludniak to Buckley were not true. There were no investigators hired by Libby in California, and, therefore, no damaging information had been sent to Poludniak by Libby. Poludniak had, however, called Pfautch and Spano and attempted to make appointments with them to release the non-existent damaging information about Senator Eagleton. Buckley met with Poludniak later that day and asked how much money Libby wanted. The response was $220,000 in cash. Buckley emphasized that the corporation still did not want to buy Libby out and was considering doing so only in order to prevent release of any derogatory information in her possession. Buckley told Poludniak that the hints about Florida did not register with the Senator and that they were not willing to turn over the money without knowing what kind of information Libby had.

In the meantime, Poludniak called Scott Weigand, Libby's husband, to report that Mr. Thyson would probably want to talk to Libby, and that she was to stand by in California for a telephone call on August 1. Scott Weigand called his wife on July 31 and reported what Poludniak had told him, including the instruction that she was to pretend that she had hired investigators in California.

Thyson, Buckley, and Poludniak met, as planned, on August 1. Poludniak repeated his earlier statements that Libby intended to release some of the material before the primary election on August 5, 1980, and some more of it before the general election, unless she got the money. Buckley and Thyson repeated their earlier contentions that they were unwilling to give Libby the money unless they knew specifically what information Libby had. Poludniak then refused again to reveal any specifics but said (falsely) that it involved both personal misconduct and official misconduct in office. Thyson told him again that the Florida clue had not registered with the Senator. Poludniak

then called Libby in California, and she and Thyson had the following conversation.

THYSON: All right. Uh Libby uh sometime ago you said you wanted to sell all of your interest in MoPipe for 220 thousand dollars.

LIBBY: Right.

THYSON: And I told you that uh, uh it was not in accordance with the family plan for you to get 220 thousand dollars at this time.

LIBBY: Uh Huh.

THYSON: And you then, nevertheless that's what you wanted. Now you have come along and say that you have assembled material uh, that if I do not buy you out you're going to release that material to the press. Is that your intention?

LIBBY: Uh Huh.

THYSON: It is. Now uh because I don't intend to buy you out unless it involves this material. Is that clear?

LIBBY: Uh say that again?

THYSON: I say I, I have told you I wouldn't buy you out and I, I'm telling you that again and what has changed my mind.

LIBBY: Yeah.

THYSON: Is this material?

LIBBY: Okay.

THYSON: All right. Now is it not reasonable that I see that. Otherwise I'm buying a pig in a poke. I understand it involves your uncle.

POLUDNIAK: Libby, I have indicated to Mr. Thyson uh that we have talked uh numerous times about that and that it's your position that uh, uh because you, you believe that your uh, uh uncle knows what you have that there just isn't any reason to uh, uh to

LIBBY: Right.

POLUDNIAK: disseminate it or distribute it.

. . .

THYSON: Now is that what you're talking . . .?

LIBBY: No. See to tell you the truth I really, I'm not planning, I'm not gonna tell you anything, you know.

THYSON: All right.

LIBBY: So . . .

THYSON: All right. Am I, am I going to see anything? Are you gonna give me a sealed envelope?

LIBBY: Yeah. I mean if, if everything works out between us sure. You know I'll give you what I've got but until that time, no.

THYSON: And will you give me all you've got?

LIBBY: Definitely. I mean, see, I'm not, it's like I'm not trying I don't wanna, to destroy Tommy or anything okay. I want, I want what I want and I wanna get out and this is obviously the only way I can do it. So you know once everything is taken care of I will give you what you want. I will not, you know, that's the end of it for me. That's fine. I don't plan on you know, holding back information and using it, you know, for future means or you know, anything like that.

It was decided that Libby would have to return from California to close the sale. Later that day the three men went to the Mercantile Bank, where a cashier's check was drawn made payable to Elizabeth Weigand for $220,000.

On Sunday morning, August 3, 1980, Libby flew back from California and met with her husband and Poludniak in his office. There was a conversation regarding the legality of their actions, and Poludniak told both Libby and her husband that he had researched the issue and that he was convinced that what they were doing was proper. Poludniak instructed Libby to write out in her hand three notes which would appear to be notes that she had taken while talking to investigators in California. Poludniak wrote them first and then Libby copied them in her handwriting. One note dealt with alleged personal misconduct, one with contributions to the Senator's campaign, and one was about Thyson and referred to certain bank accounts he had. As the defendants later testified, the contents of the notes were pure fabrication with no basis in fact. Neither defendant ever in fact had any evidence of any impropriety on the part of Senator Eagleton. The three notes, along with photographs of corporate records, were sealed in a manila envelope and placed in Poludniak's briefcase.

Later that day Libby and Poludniak met with Thyson and Buckley at the Missouri Athletic Club in St. Louis. The meeting was recorded by F.B.I. agents. Buckley and Thyson refused to transfer the $220,000 because Poludniak would not allow them to see the contents of the manila envelope. Poludniak and Weigand were arrested outside the club, and the briefcase containing the manila envelope was seized pursuant to a search warrant. Defendants were released without being charged a few hours later. The indictment was filed September 9, 1980, and the case was assigned to Chief Judge H. Kenneth Wangelin. The trial commenced on October 14, 1980, with the voir dire of the jury. Testimony began on October 16, 1980, and the case was submitted to the jury on October 24. The jury returned verdicts

of guilty as to both defendants on both counts of the indictment. Poludniak was sentenced to four years' imprisonment on Count II, with a suspended sentence on Count I. Ms. Weigand was committed to the custody of the Attorney General under the Youth Correction Act, 18 U.S.C. §5010(b).

Defendants present seven issues to this court:

1. Whether the trial court erred in denying defendants' motion to disqualify all of the United States District judges for the Eastern District of Missouri.

2. Whether the trial court erred in denying defendants' motions for change of venue.

3. Whether the trial court conducted a sufficient voir dire examination.

4. Whether the trial court erred in denying the defendants' motions for judgment of acquittal.

5. Whether the trial court erred in allowing the documents containing the allegedly damaging material to be read to the jury.

6. Whether the court's instruction on advice of counsel was sufficient.

7. Whether the trial court erred in failing to hold a hearing on the accuracy of the Probation Office's estimate, in the presentence report, of the offense-severity rating that the Parole Commission would be likely to assign to defendants for purposes of applying its guidelines for release on parole.[3]

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[3] Defendants have asked this court to remand the case to the District Court for a hearing to determine whether the offense-severity rating recommended by the United States Probation Office is correct. This issue is inappropriate for consideration on a direct appeal of defendants' convictions. Final determination of the offense-severity rating,

Disqualification of the Eastern District Judges

Defendants' first assignment of error initially arose out of an unrelated incident. Prior to trial in this case, a state prisoner escaped from custody in the United States Court and Custom House in St. Louis while entering the building to appear in a civil-rights suit. The security problem was reported in the *St. Louis Post-Dispatch* three weeks before defendants' trial began. The article included comments from Chief Judge Wangelin about the need for tighter security and more guards. The following sentence was included:

> Wangelin said he hopes to talk to Missouri's U.S. Senators this week to see whether he can get money to hire more marshals. "God only knows that we need them" he said.

St. Louis Post-Dispatch, Sept. 21, 1980, p.10C.

Immediately above the security article was an article about the present case. The story, primarily discussing defendants' motion for a change of venue, mentioned that the case was assigned to Chief Judge Wangelin and that Senator Eagleton was the victim of the alleged attempted extortion. The next day defense counsel moved for the disqualification of Judge Wangelin and all other district judges for the Eastern District. The claim is that, under the circumstances, the judges' impartiality might reasonably be questioned.

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which is a factor used in determining a defendant's proposed release date, is made by the United States Parole Commission after incarceration. Defendants contend that the District Court may have been influenced by the "Very High" rating in setting their sentences. Judge Wangelin stated during the sentencing hearing, however, that he was not bound by the ratings and recommendations of the Probation Office. He suggested that defendants make their argument to the United States Parole Commission, and we agree with that recommendation.

28 U.S.C. §455(a) provides:

> Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

This section, as revised in 1974, requires the use of an objective standard of reasonableness in a judge's disqualification decision. *United States* v. *Ritter,* 540 F.2d 459 (10th Cir.), *cert. denied,* 429 U.S. 951 (1976). Since the goal of the judicial-disqualification statute is to ensure not only actual impartiality, but also the *appearance* of impartiality, it is not necessary that actual bias or prejudice be present before disqualification is required.

> [A] judges faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word "might" in the statute was intended to indicate that disqualification should follow if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality.

Potashnick v. *Port City Constr. Co.,* 609 F.2d 1101, 1111, (5th Cir. 1980), *cert. denied,* 101 S. Ct. 78 (1980).

Applying the above standard of reasonableness, we conclude that there was no error in Judge Wangelin's failure to disqualify himself and the entire bench of his district. Although we agree that the juxaposition of the two articles was unfortunate, we do not see how the judge's comments on the need for better security in the federal courthouse can require disqualification. Judge Wangelin was speaking in his official capacity as Chief Judge of the Eastern District of Missouri when he stated that he would soon be talking to Missouri's senators in Washington about securing additional funds for security. Courthouse security is his responsibility, and, like all branches of government, he and

his district must rely on Congress for money. To carry defendant's argument to its logical conclusion would suggest that all federal judges would have to disqualify in cases involving members of Congress, because they might appear to be partial to those who have the power of the purse. In addition, Senator Eagleton is not a party to this action. He was the victim of the alleged crime, not a litigant whose own actions brought him to court.

We hold that a reasonable person, knowing all the circumstances, would conclude that Judge Wangelin was, at the time he made the statement, legitimately concerned about the escape of a convicted murderer within the courthouse, and would not conclude that the Judge appeared to be partial to the Senator and his participation in defendants' trial as a witness.[4]

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[4] The newspaper story at issue was entitled, "U.S. Judge Encountering Problems in Tightening Courthouse Security." The first two paragraphs read:

> Federal judges here are continuig to study way to tighten security at the U.S. Courthouse, 1114 Market Street, but no easy or inexpensive solutions are in sight, says Chief District Judge H. Kenneth Wangelin. Courthouse security has been a major concern for the judges and other court officials since Aug. 11, when convicted murderer Dennis Kirksey escaped as he was being taken into the building to testify in a civil rights trial. Kirksey has not been recaptured.

Judge Wangelin went on to explain five plans being discussed to solve the security problem. The reference to talking to Missouri's senators about hiring more marshals is in the seventh paragraph of the eight-paragraph story. We recount all of this detail to show that the article is not primarily about the judge's asking the senators for more money, but rather concerns an on-going study of proposals to improve security at the federal courthouse. It may be noted, in addition, that every member of this Court has chambers in the same building. The statute should not be interpreted to require disqualification on such a chimerical theory.

Change Of Venue

Both defendants moved for a change of venue prior to trial or, in the alternative, to have non-Missouri residents called as veniremen. The motion to bring in non-Missouri veniremen was denied. Ruling on the motions for change of venue was reserved pending voir dire. Defendants contend on appeal that their motions to move the trial outside the State of Missouri because of extensive pretrial publicity should have been granted during the pretrial period. Neither defendant asked for a continuance to allow the publicity to subside, as it might have done after the general election in November. Instead, the defendants insisted on a speedy trial, which was their right, and pressed for removal to another state.

This Court has repeatedly held that it is preferable to await voir dire before ruling upon motions for change of venue.

> Mere exposure to publicity or the formation of tentative impressions by some jurors is not enough to require a change of venue. The ultimate test is whether he or she can set aside any impression or opinion resulting from that exposure and render a verdict based solely on the evidence presented at trial.

United States v. *Brown*, 540 F.2d 364, 378 (8th Cir. 1976). *Accord, e.g., Blumenfield* v. *United States*, 284 F.2d 46 (8th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961).

Certainly there was extensive publicity in this case from August 3, 1980, when defendants were arrested and released, until the trial in October. Any case involving a public figure, particularly one who is running for office, will attract the attention of the media and the public. We agree with the District Court that the pretrial publicity was not so extensive as to create a presumption that an impartial jury could not be seated. There was no abuse of discretion by refusing to rule on the transfer motion before voir dire.

A related argument, not raised in defendants' brief in this Court, was also stated in their joint motion for a change of venue. That argument is that it would be inappropriate to try the case in Missouri, because Senator Eagleton represented all of the potential jurors. Defendants contended below that this unusual circumstance created a grave risk that they would not receive a fair and impartial trial. We think this question is answered by the voir dire, which is discussed later in this opinion. Each potential juror was questioned individually about his political affiliations and attitude and attitude toward Senator Eagleton as a witness. Each was asked if he had ever worked for or against the Senator in a campaign and whether he had ever requested or received assistance from the Senator's office. Jurors were then asked whether they would be inclined to believe him any more or less than any other witness and whether they had any strong feeling for or against him. Satisfactory answers were given to these questions.

Defendants had submitted a more extensive set of questions on Senator Eagleton, but they do not now contend that the voir dire was inadequate on this topic. They do not allege any actual prejudice on the part of the jury, and there is no hint in the transcript of the voir dire that the jurors were prejudiced either for or against Senator Eagleton. Since no prejudice has been shown, we hold that the denial of change of venue was appropriate.[1]

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[1] The point was raised at oral argument that it was not possible to question the panel adequately on this topic, because it would be improper to ask a juror whom he voted for in any election, what political party he belonged to, or whether he had contributed to political campaigns. If that is true, the argument goes, it would be impossible either to prove or disprove prejudice. The trial, therefore, should have been moved out of the State of Missouri. This is an admittedly unusual situation, but we cannot subscribe to the theory that difficulty in proving prejudice is tantamount to proof that it exists. Defendants are assuming that Senator Eagleton's status as a public figure assured partiality towards him by the jury panel. It is just as possible that his position could cut the other way. While those who admire him might conceivably want to help him, those supporting his opponent might desire the opposite result.

Adequacy Of The Voir Dire Examination

Closely related to defendants' argument on change of venue is their argument that an inadequate voir dire deprived them of the chance to determine whether the jurors were fair and impartial. Defendants requested three particular types of questions: questions regarding the juror's political affiliations, questions about religious beliefs,[4] and questions as to the content of articles and newscasts to which the jurors had been exposed. If a juror mentioned the Church of Scientology in describing the content of articles he had read, then the defendants wanted the court to ask more detailed questions about the church. On appeal their voir dire argument focuses on the court's refusal to allow examination on the contents of the articles read by the jurors.

Questioning by the Court on the sensitive issues of pretrial publicity, political affiliations, and the Church of Scientology was conducted on an individual basis. On the subject of pretrial publicity, the Court asked the following questions:

> Q. [To Juror Number 3] What type of media coverage have you been exposed to in this case and by that I mean, have you seen TV, read newspapers, listened to the radio or any combination of the above?
>
> Q. Newspaper only. What newspaper?
>
> Q. How many articles have you read in the *Globe*?
>
> Q. Did the publicity make a strong impression on you?
>
> Q. Do you remember any particular details?

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[4] There was some question that Libby intended to donate all or part of the money she received from the sale of the stock to the Church of Scientology. It was important, therefore, to determine whether any panel member was prejudiced against this church.

Q. Based on this publicity that you have heard or read, have you formed an opinion about this case as to the guilt or innocence of either of the defendants?

Q. Could you set aside any publicity that you have heard or read about this case and merely decide the case on the evidence in this courtroom?

Q. And on the instructions of the law that I give you?

Q. Have you ever discussed the case with friends or acquaintances?

Out of the fifty veniremen questioned, all but three remembered hearing about the case, but only one had formed any opinion about it. Three others said that they remembered details of the publicity. All forty-four who remained after six were dismissed[1] stated that they would be able to decide the case on the evidence produced in the courtroom.

Defendants claim the right to ask "content" questions regarding pretrial publicity, relying on *Silverthorne* v. *United States*, 400 F.2d 627 (9th Cir. 1968). The court in *Silverthorne* found a voir dire inadequate because the trial court relied solely on the jurors' subjective evaluation of their own ability to set aside their preconceived notions of defendant's guilt. Almost 30% of the panel thought the defendant was guilty, and under those circumstances the Ninth Circuit thought the trial court should have sought some more objective information. *Id.* at 639. In addition, the trial court in *Silverthorne* did not inquire as to the source of the pretrial publicity or the extensiveness of each juror's exposure. That is not the case here. Even without questioning the jurors on the contents of the articles, the District

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[1] Six jurors were excused. One was challenged for cause because of active political affiliations and another expressed negative feelings about the Church of Scientology. None of defendants' challenges for cause was overruled.

Court had ample objective criteria for judging the partiality of the panel. Each juror was asked individually (1) what types of media coverage he had seen or heard, (2) how many telecasts he had seen or newspaper articles he had read, (3) what television, radio stations, or newspapers were the sources of the information. These questions, when coupled with the questions on impact of the publicity, details remembered, and impressions formed, provided both the court and the defendants with an adequate basis for applying the ultimate test: Whether the jurors had been exposed to pre-trial publicity and, if so, whether they could set aside any impression or opinion resulting from that exposure and render a verdict based solely on the evidence presented at trial. *Irvin* v. *Dowd,* 366 U.S. 717, 722-23 (1961). We also note that in *United States* v. *Haldeman,* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied,* 431 U.S. 933 (1977), the District of Columbia Circuit approved the denial of content questions concerning pretrial publicity in one of the "Watergate" trials. That court found detailed inquiry into sources and intensity to be adequate. *Id.* at 69.

Defendants also object to the court's questioning of the jury panel on the subject of the Church of Scientology. Although we doubt that this issue was properly preserved in the District Court, we will address it nevertheless, in order to assure ourselves that an injustice has not been done.

The court asked the following set of questions about the Church of Scientology, tailoring the questions to fit the responses.

> Q. Now, I want to ask you some questions about the Church of Scientology. Have you ever heard of the Church of Scientology?
>
> Q. The defendants have been members of that church and I want to know if that would affect you either way?

Q. Do you have any close family members or friends who are members of the Church of Scientology?

Q. You don't know anything about them?

Q. About their teachings, philosophy, or anything?

Most of the jurors had never heard of the Church of Scientology, and those who had could not remember any specific information about its teachings or philosophy. The one juror who identified it as a cult and expressed a disapproval of cults was later dismissed for cause with the consent of both sides. Defendants argue that the mere mention of the church was enough to deny them a fair trial. They had earlier filed a motion in limine seeking to prevent the government from mentioning the church during the trial. The motion was denied, but the government did not explore the defendants' connections with the church during the trial. The church was mentioned only once, during the examination of Mr. Thyson.

The court's decision to question the panel about the Church of Scientology was not an abuse of discretion. Both sides had a right to know if any jurors had strong feelings about this church. It is the court's duty to ensure that the defendants receive a fair trial and to neutralize the effect of any known prejudice. *United States* v. *Bear Runner,* 502 F.2d 908 (8th Cir. 1974). Had the court not questioned on this topic, and had there then been testimony about the church during the trial, the stage would have been set for a claim of error. Defendants have demonstrated no actual prejudice arising from these questions.

Defendants additionally contend that the voir dire was so inadequate that they were unable to exercise their peremptory challenges effectively. We have read the 197 pages of transcript of the voir dire and cannot agree. The voir dire examination took the better part of two days, and there is every indication that the court did its best to seat an unbiased jury. We find no error.

Sufficiency Of The Evidence

As their fourth point for reversal, defendants contend that the Court erred in failing to grant their motions for judgment of acquittal as to Count II of the indictment on the ground that the evidence failed to prove the existence of a conspiracy as a matter of law. Defendants argue that no agreement was shown and that they lacked the requisite knowledge and intent.

Libby Weigand had been trying since January 1980 to convince her uncle and Mr. Thyson to buy her 6 1/4% interest in Missouri Pipefittings. An offer was made by Stephen Poludniak in her behalf in May. She had been repeatedly told by Senator Eagleton or his representatives, Mr. Thyson and Mr. Buckley, that the company would not buy her stock.

The government's position is that the conduct of both defendants was legitimate up until July 25, 1980, and that the illegal activities began after that date. Ms. Weigand contends that since she was in California on that date and had no knowledge of Poludniak's threats to release information, there could be no agreement on her part to extort. The answer is that her later acts of complicity were ample evidence from which the jury could have found that she and Poludniak acted in concert. In the August 1 telephone conversation with Thyson from California she confirmed her intention to release damaging information against her uncle unless the company bought her stock. On August 3 she wrote the allegedly damaging material in her own handwriting and accompanied Poludniak to the Missouri Athletic Club, where they intended to exchange the "information" for the $220,00 check. Poludniak testified at trial that the scheme was all his idea. That may well be, but the scheme became a conspiracy when Ms. Weigand participated in the telephone call from Thyson on August 1. It is not necessary for the government to show who thought up the scheme, or that Libby did or did not know specifically what Poludniak was up to before her husband called her in California on July 31. Hav-

ing reviewed the complete trial transcript, we conclude that there was ample evidence from which the jury could have found that the defendants conspired to commit extortion.

Defendants also challenge the sufficiency of the evidence that both conspirators possessed the required intent to conspire and to commit the substantive offense. They both testified that they believed their activity was conducted in good faith without any criminal intent, in order to obtain money for Ms. Weigand's interest in Missouri Pipefittings after Thyson and Senator Eagleton had refused to deal with them on any other basis. Poludniak testified that he had researched the United States Code Annotated and was convinced that what they were doing was completely legal. He further testified that on the morning of the attempted exchange he assured both Ms. Weigand and her husband that they were not committing a crime. Libby testified that she relied on the advice of counsel and had no idea that what they were doing was against the law.[8]

This argument also fails. Defendants both admitted doing all the acts cited by the government as "overt acts" in furtherance of the conspiracy. There was no claim of accident or mistake; they admitted that they made the threats in order to get the money. It was for the jury to decide whether to believe that the defendants thought their actions were legal. The jury was correctly instructed on specific intent (defendants do not quarrel with those instructions), and defendant Wiegand *had the additional advantage* of her advice-of-counsel argument. The jury was instructed that the government must prove that defendants acted willfully, with specific intent "to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law." The jury was also correctly instructed that there is a presumption that every person knows what the law

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[8] The court's instruction on advice of counsel will be discussed below.

forbids, but that ignorance of the law is to be considered by the jury in determining whether or not the defendants acted or failed to act with specific intent. The jury had ample opportunity to consider this issue and apparently rejected defendants' contentions. We will not disturb that verdict.

Reliance on Advice of Counsel

Defendant Weigand contends that the Court's instruction on advice of counsel was erroneous and confusing. The Court gave the following instruction:

> The defendant Weigand claims that she is not guilty of willful wrongdoing because she acted on the basis of advice from her attorney.
>
> Advice of counsel is not a defense to the crimes of conspiracy or extortion. It is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked specific intent to violate the law.
>
> If the defendant before taking any action sought the advice of an attorney whom she considered competent, in good faith, and for the purpose of securing advice on the lawfulness of her possible future conduct and made a full and accurate report to her attorney of all material facts of which she has the means, and knowledge and acted strictly in accordance with the advice of her attorney given following her full report, then the defendant would not be willfully doing wrong in doing something the law forbids, as that term is used in these instructions.
>
> Whether the defendant acted in good faith for the purpose of seeking guidance as to the questions about which she was in doubt, and whether she made a full and complete report to her attorney, and whether she acted strictly in accordance with the advice received are questions for you to determine.

> Advice of counsel does not under all circumstances confer complete immunity on a defendant. If this were the law a defendant could insulate herself from prosecution by having a lawyer tell her that a particular course of conduct was legal, no matter how violative of the law that conduct was and regardless of the consciousness of wrongdoing or unlawfulness on the defendant's part and on her lawyer's part. No such legal doctrine exists. No one can willfully and knowingly violate the law and excuse herself from the consequences by claiming that she followed advice of counsel.

The trial court also submitted defendant Weigand's "position" instruction to the jury, as follows:

> It is the position of the defendant Elizabeth Weigand that she is not guilty of either count of the indictment for the following reasons: (1) Defendant Elizabeth Weigand did not have the specific intent to commit a crime as further defined in these instructions; (2) Defendant Elizabeth Weigand did not act willfully in that she acted upon advice of counsel as further defined in these instructions.

Ms. Weigand's specific objection is to the first sentence in the second paragraph of the Court's instruction: "Advice of counsel is not a defense to the crimes of conspiracy or extortion." This statement has been approved by the Ninth Circuit as a correct statement of the law when the instructions as a whole make it clear that the advice should be considered in determining whether the defendant's actions were willful. *United States* v. *Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977). We agree. The statement that advice of counsel is no defense is a shorthand statement of the acknowledged rule of law that advice of counsel cannot be a defense to a willful and knowing violation of law. "[N]o man can willfully and knowingly violate the law, and excuse himself

from the consequences thereof by pleading that he followed the advice of counsel." *Williamson* v. *United States,* 207 U.S. 425, 453 (1908). *See also Tarvestad* v. *United States,* 418 F.2d 1043 (8th Cir. 1969), *cert. denied,* 397 U.S. 935 (1970). Defendant's position was amply presented to the jury. In both the "advice of counsel" instruction and the "position" instruction, the jury was told that she claimed that she did not act willfully because she acted upon advice of counsel. The "advice of counsel" instruction told the jury that a defeendant acting on adivce of counsel in good faith, after full disclosure of all facts, "would not be willfully doing wrong in doing something the law forbids, as that term is used in these instructions."[9]

Admission of Prejudicial Evidence

Defendants finally contend that it was error for the Court to allow the reading into evidence of Exhibit 27(a), a handwritten note (falsely) describing evidence of supposed personal misconduct in Florida by Senator Eagleton. The note, along with two others, was read to the jury by Senator Eagleton during the government's case in chief. Defendants opposed the admission of the note and stipulated that Libby Weigand had written the note.

The alleged error is that the Court failed to apply the balancing test of Fed. R. Evid. 403(b). Rule 403 states: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, con-

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[9] If there is any error in the handling of the advice of counsel issue, it is error in Ms. Weigand's favor. The advice of counsel issue is appropriate only in a limited class of cases in which willful action is an essential element and legal problems are present. "A defendant is entitled to this instruction only if his proposed conduct presents a substantial legal problem, so that he requires legal advice in resolving it." Devitt & Blackmar, *Federal Jury Practice and Instructions* §14.12 (3d ed. 1977).

fusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Defendants claim that the contents of the note were unnecessary to proof of the government's case and so prejudicial to defendants that any probative value was substantially outweighed by unfair prejudice to defendants.

This argument is without merit. Both defendants claimed lack of specific intent and lack of an agreement as their defense. The writing of the notes was an integral part of the scheme and strong evidence of Libby's involvement with Poludniak. Without knowledge of the contents of the notes the jury had only the vague references to personal misconduct in Florida before it. We do not think that the government should be limited merely to stating that defendants threatened to release "damaging information," particularly when defendants admitted that the allegedly damaging information had no basis in fact. The content of the note gives meaning to the vague references in Ms. Weigand's telephone conversation with Thyson and makes it clear that she was threatening to damage the Senator's reputation. We see no error in the admission of the note into evidence or in the manner in which it was introduced.

The judgments are affirmed.

LAY, Chief Judge, Dissenting:

I respectfully dissent. It is my view that the defendants were denied a fair trial and that the district court erred in failing to grant the defendants' pretrial motion for change of venue.

Senator Tom Eagleton represented all the potential jurors drawn from the general electorate in the State of Missouri. The trial was held approximately two weeks before the general election in which he was running for one of the highest offices in the nation. The majority opinion correctly suggests that the defendants could have moved to continue the trial until after the elec-

tion. Yet, surely these defendants were not required to select between their constitutional right to a speedy trial and a fair one. Each of the potential jurors belonging to the general electorate had undoubtedly formed before the trial a personal impression of Senator Eagleton based upon the Senator's many years of service to Missouri. In my judgment it was clear error for the trial court to assume that potential jurors could fully set aside these impressions in a trial where the Senator was a central figure. Such an assumption is totally unrealistic. This case involved the Senator's reputation for truth and veracity as much as it did the defendants'. The Senator's word was on trial as much as the defendants'. If Senator Eagleton had been the defendant charged, there can be little doubt that under such circumstances the court would have granted a change of venue if he had moved for one. The trial judge's attempt to question the potential jurors in camera demonstrates his own concern that a fair selection of a jury could be troublesome.[1] *Irvin* v. *Dowd*, 366 U.S. 717, 722-23 (1961). It is clear to me that the motion for change of venue should have been granted. Any other ruling must speculate as to possible unknown prejudice; that is something to which no defendant in a criminal case should ever be subjected.

It is argued that change of venue was not needed because the voir dire examination of potential jurors gave no hint of prejudice for or against Senator Eagleton. Although voir dire can uncover prejudice among potential jurors, the absence of prejudicial answers cannot be equated with the absence of prejudice. A juror may consciously or subconsciously harbor prejudice and bias on sensitive subject matter. The nod of the head in response to the basic inquiry of "Can you be fair?" should provide little satisfaction in a case electrified by sensitive issues

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[1] *See In re United States ex rel. Pulitzer Pub. Co.*, 635 F.2d 676 (8th Cir. 1980).

such as the one at bar. It should be obvious that such prejudice cannot always be elicited by merely questioning the jurors. *Cf. Rideau* v. *Louisiana*, 373 U.S. 723 (1961); *Marshall* v. *United States*, 360 U.S. 310 (1959); *United States* v. *Davis*, 583 F.2d 190, 197 (5th Cir. 1978); *United States* v. *Williams*, 568 F.2d 464 (5th Cir. 1978); *United States* v. *Bear Runner*, 502 F.2d 908 (8th Cir. 1974); *United States* v. *Engleman*, 489 F. Supp. 48 (E.D. Mo. 1980); *People* v. *McKay*, 37 Cal.2d 792, 236 P.2d 145 (Cal. 1951) (Traynor, J.); *American Bar Ass'n Project Minimum Standards for Criminal Justice, Standards Relating to Fair Trial and Free Press*, § 3.2, Commentary at 121-28 (Approved Draft 1968); Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S.Cal. L. Rev. 503 (1965).

The trial court was not dealing with the normal criminal case. A popular incumbent such as Senator Eagleton will always be in the news, but surely the trial court should have considered the massive amount of public attention he received as the election drew near. Any political election and the resulting publicity are likely to create a supercharged atmosphere. Tenacious sides are drawn not only as to issues, but also as to individual personalities of the candidates. Politics creates intense interest in many citizens; emotions can run high and some of the citizenry may possess an almost religious fervor as an election draws near. Man's political nature is basic to his existence. It was once said "neither philosophy nor policy can shut out the feelings of nature." J. Story, *Miscellaneous Writings* 80. Political beliefs, much like religious convictions, are one's own business. There was little likelihood, as both sides concede, that these beliefs could be subjected to cross-examination. Once this was acknowledged, it should have been obvious that Senator Eagleton was the central focus of each individual juror's political belief.

The majority is persuaded that those who disliked Senator Eagleton could balance out those who support him. However, a

man who is reelected to the Senate three times is unlikely to have as many detractors as supporters. Nevertheless, assuming that there would be such a balance, the argument is still rather weak. It is tantamount to saying that if three jurors are biased against the defendant, the jury is impartial so long as three other jurors are not.

The record demonstrates that the trial judge took special care to voir dire jurors individually and outside the presence of each other. He also made an earnest effort to reach and bring forth latent prejudice. Still, the special situation of this case prevents the effectiveness of voir dire. When asked whether he or she can be impartial, it is the rare individual who will say "no." Similarly, it is the rare partisan of Senator Eagleton who would concede that he or she would give greater weight to the Senator's testimony than to another's.

A change of venue is required when the minds of the inhabitants of the community in which the cause is pending may be so prejudiced that a fair trial cannot be had therein. *Cf.* Mo. Rev. Stat. § 545.030 (1949). Community prejudice may appear and influence an otherwise impartial jury when the defendant is somehow different than the rest of the community. *Cf. United States ex rel. Brown* v. *Smith*, 200 F. Supp. 885 (D. Vt. 1961), *rev'd*, 306 F.2d 546 (2d Cir. 1962), *cert. denied*, 372 U.S. 959 (1963) (Jewish man who recently settled in Vermont town made enemies as proprietor of cut rate drug store). However, community prejudice may also exist where the victim of the crime is well-respected by the community. *People* v. *McKay*, 37 Cal.2d 792, 236 P.2d 145 (Cal. 1951).

Senator Eagleton was recently reelected to his third term. There is little doubt that he was and is respected by the vast majority of the citizens of the State of Missouri. Because of his status and fame he possessed a relationship with each potential juror that is unlike that of any other person in Missouri. This

community sentiment could easily be translated into community prejudice against the defendants accused of extorting him. In my judgment there existed a reasonable likelihood that community prejudice existed to such an extent that the defendants could not be guaranteed a fair trial. *Sheppard* v. *Maxwell*, 384 U.S. 333, 362-3 (1965). In *Sheppard* the Court held that the court has "the duty to make an independent evaluation of the circumstances" and where there is reasonable likelihood that prejudice might "prevent a fair trial, the judge should continue the case . . . or transfer it . . . ." *Id.* While publicity about the trial itself may not have been inflammatory, the supercharged atmosphere of the impending election, the publicity and notoriety of Senator Eagleton and the trial, the unique relationship of the Senator to the political beliefs of each of the potential jurors and the obvious focus upon the Senator's integrity and credibility in the issues tried mandated in my judgment a transfer of this trial outside the State of Missouri.

I conclude the trial court abused its discretion in denying defendants' motion for change of venue and the cause should be remanded for a new trial.

A true copy:

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 80-2133 and 80-2134

United States of America,
Appellee,

vs.

Stephen Poludniak

and

Elizabeth E. Weigand,
Appellants.

Appeal from the United States District Court for the
Eastern District of Missouri
Hon. H. Kenneth Wangelin, District Judge

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR TRANSFER TO THE COURT EN BANC, WITH SUGGESTIONS IN SUPPORT THEREOF

Petition For Rehearing

Now come Stephen Poludniak and Elizabeth E. Weigand, appellants, by and through their attorney of record, Leonard J. Frankel, and respectfully petition the Court to grant a rehearing, for the following reasons:

A. Disqualification

In addressing appellants' claim of error due to Judge Wangelin's failure to disqualify himself, this Court on page 13 of its opinion stated:

> "To carry defendants' argument to its logical conclusion would suggest that all federal judges would have to disqualify in cases involving members of Congress, because they might appear to be partial to those who have the power of the purse."

Because an argument can be carried to an illogical extreme does not necessarily make the argument invalid. The issue in the recusal question is *not* whether a reasonable person analyzing the two newspaper articles, and considering the nature of Judge Wangelin's other duties, would conclude that the Judge would be partial to the Senator as a witness in this case. The issue is whether a reasonable person taking at *face value* an article about the present case referring to Judge Wangelin as the trial judge and Senator Eagleton as the victim, with immediately below, an article that this same Judge would be contacting this same victim for financial assistance within the same time frame as the trial, might harbor doubts about that Judge's partiality in sitting on the case. An objective reading at face value, and not subjective analysis as this panel applied, is the proper standard for determining whether a trial judge should disqualify himself because his impartiality might reasonably be questioned.

B. Change of Venue and Restrictions on Voir Dire

The closely related issues of change of venue and restricted inquiry on voir dire are ones of exceptional importance in this case, as they may be in others in the near future. It should first be noted that at trial as well as in their original brief to this Court, the appellants contended that the failure to grant a change of venue in this case was erroneous on *two* grounds: the

pervasive and prejudicial nature of the pretrial publicity; *and* the status of the victim as the popular Senator for the State of Missouri, up for re-election within a matter of days after the trial, who was the duly elected representative of all of the potential jurors. (*See* Brief for the Appellants, p. 27).

Appellants do not wish here to reargue the facts, and see no need to delve into the prejudicial impact of Senator Eagleton's statuts as the victim: one need only be referred to Chief Judge Lay's dissent. Although there was voir dire of the jury panel on the Senator's testimony, the questions amounted to no more than soliciting each juror's opinion that he/she could set aside past impressions from the Senator's more than twenty-one years of public office-holding in the State, (Circuit Attorney for the City of St. Louis, Attorney General, Lieutenant Governor, and Senator). That the appellants felt the voir dire on this topic was inadequate was made all the more clear by their request, refused by the trial court, for additional voir dire of a juror regarding union political contributions — an issue which the panel in its opinion failed to address, (Brief for the Appellants, pp. 37-38).

Like the restricted inquiry on the political issue, the restricted inquiry on the publicity issue amounted to no more than a request for a subjective evaluation of each juror's determination as to their partiality. Although the veniremen were asked about the source of their exposure to media coverage (often a combination of radio, television and newspapers), the amount of coverage they were exposed to (for many it was multiple), and if they had engaged in discussions about the case (quite a few had), only one question mattered in the decision of the trial judge to excuse a juror for cause: whether the juror could set aside the publicity and decide the case solely on the evidence presented. Thus, the trial court was not making an independent determination of the juror's partiality, as he is required to do, but relying on the juror's own evaluation of his ability to judge the case. *United States* v. *Davis*, 583 F.2d 190, 197 (5th Cir. 1978).

The panel in its opinion noted that the 197 pages of voir dire was adequate. In *Irvin* v. *Dowd,* 366 U.S. 717 (1961), the denial of a second change of venue was the basis for a granting of federal habeas corpus relief. The State's position was that the 2,783 pages of voir dire were adequate in that the result was a panel of jurors qualified to sit for each had indicated he could render an impartial verdict. But the Court found that the nature of the case and the barrage of publicity on it had caused an "influence permeating the community" which was so persistent that it "unconsciously fights detachment from the mental process of the average man", and it would be difficult to say that each juror would be able to exclude that influence from his deliberation. 366 U.S. at 727. In other words, the voir dire was inadequate because all it did was extract each juror's subjective opinion that he could be impartial, and in light of the nature of the case and massive publicity, that opinion was insufficient to guarantee the defendant a fair trial.

In the present case, the flood of publicity and the status of the victim were both pervasive influences permeating the community. As the panel itself noted on page 20 of its opinion, the trial court had a duty to neutralize the effect of any known prejudice and to ensure the defendants received a fair trial, *United States* v. *Bear Runner,* 502 F.2d 908 (8th Cir. 1974). If the trial judge was going to use voir dire only to extract promises of neutrality from the jurors, despite the influences he knew existed in the community which endangered the appellants' right to a fair trial, then he should have granted a change of venue before even attempting voir dire, as was done in *United States* v. *Engleman,* 489 F.S. 48 (E.D. Mo. 1980).

Additionally, on the trial court's questioning of the jury panel regarding the Church of Scientology, the panel stated on page 20 of its opinion:

> "Had the court not questioned on this topic, and had there been testimony about the church during the trial, the stage

> would have been set for a claim of error. Defendants have demonstrated no actual prejudice arising from these questions."

However, had the trial court followed defendants' request not to mention the Church of Scientology unless a juror brought up the subject in an answer to a question, then they would have had no basis for a claim of error. There was no testimony at trial regarding Libby's intent to donate money from the sale of her stock to the Church (see footnote 6 of the panel's Opinion); the only testimony regarding the Church was Mr. Thyson's mention on re-direct of Mimi and Libby's membership (Tr. 383), and his statement was rather innocuous. But there was no longer any need for the Government to inject what would have been improper evidence of both appellants' involvement with the Church — the Court did that for them. And as for showing prejudice, how can the appellants be required to speculate as to possible unknown prejudice. (*See* Dissent of Chief Judge Lay, p. 28).

C. Advice of Counsel Instruction

In discussing appellant Weigand's objections to the instruction on advice of counsel, the Court on page 25 of its opinion stated:

> "The statement that advice of counsel is no defense is a shorthand statement of the acknowledged rule of law that advice of counsel cannot be a defense to a willful and knowing violation of law."

Appellant would first note that the jurors were read aloud the instructions they were to follow. The opening of the rather lengthy advice of counsel instruction was: "Advice of counsel is not a defense to the crimes of conspiracy or extortion." While to a lawyer this might be a "shorthand statement" of an acknowledged rule of law, appellant submits that a lay person

hearing once this long and involved instruction could easily have been confused. Thus, a lay person might have believed from the evidence that Libby did not act willfully and knowingly due to her good faith reliance on the advice of her attorney, but since "advice of counsel is no defense", disregarded that factor. The purpose of the instruction was to inform the jurors that if a defendant knowingly and willfully violates a law, the additional factor that an attorney advised them to so act is irrelevant as a defense. But that rule is not what a lay person could have easily gleaned from hearing the trial court read the long and convoluted instruction.

The panel made mention in footnote 9 that the instruction may not have even been appropriate, since the instruction should only be given where willful action is a necessary element of the offense and the defendant's course of conduct involved a substantial legal problem. There is no question that willful action was an essential element of the charges against Libby. And if the proposed sale of 6¼% interest in a closely held corporation with a restrictive stock agreement, where the shareholder even had difficulty obtaining a copy of the agreement, is not a substantial legal question, it is hard to imagine what is.

D. Admission of Prejudicial Evidence in a Prejudicial Manner

In their original brief, appellants claimed error in the reading into evidence by Senator Eagleton of the inflammatory notes seized from defendant Poludniak's briefcase on the day of his arrest. In its opinion, the panel first termed these notes "an integral part of the scheme" and found no error in admitting the evidence or in the manner in which it was introduced.

Appellants would first point out that since none of the notes were ever transmitted, indeed the crimes the defendants were charged with were technically completed before the notes were ever written, it is difficult to see how the evidence could be termed "integral".

But even more disturbing is the failure of the panel to discuss the prejudicial manner of the introduction of the evidence, other than to state the conclusion that it found no error. As was discussed in appellants' brief on page 41, the trial court also must consider the manner of presentation when applying the balancing test of Federal Rule of Evidence 403(b). In this case, the notes never even left the appellant's possession, and none of the victims ever saw them until after the appellants were arrested. If the notes were to be admitted under Rule 403, and read to the jury, then the most logical person to do the reading would have been the FBI agent who seized them. The trial judge's basis for allowing Senator Eagleton to read the notes was concern for the Senator's political situation (Tr. 583-84); a concern that has no place in a Rule 403(b) balance, and which could only serve to inflame and prejudice the jury.

Petition For Transfer To The Court En Banc

Now come Stephen Poludniak and Elizabeth Weigand, appellants, by and through their attorney of record, Leonard J. Frankel, and respectfully petition this Court to grant a transfer of this case to the Court en banc for the following reasons:

The special situations presented by this case were apparent from the time Senator Eagleton called his press conference to announce the arrest of his niece and her attorney. A key witness against the two was the Senator himself. At trial, on several factual issues it came down to whom to believe, the Senator, or his nieces and nephew.

The attempted extortion of a public officer of a state is bound to stir up controversy in that state. And that is especially so when that officer is a popular one, who has been continually elected to state-wide positions over the past twenty-one years. And it is even more especially so when the defendants include a member of the Senator's family, and trial takes place a scant two weeks before the Senator is up for re-election. As stated by Chief Judge Lay:

"Senator Eagleton was recently reelected to his third term. There is little doubt that he was and is respected by the vast majority of the citizens of the State of Missouri. Because of his status and fame he possessed a relationship with each potential juror that is unlike that of any other person in Missouri. This community sentiment could easily be translated into community prejudice against the defendants accused of extorting him. . .While publicity about the trial itself may not have been inflammatory, the supercharged atmosphere of the impending election, the publicity and notoriety of Senator Eagleton and the trial, the unique relationship of the Senator to the political beliefs of each of the potential jurors and the obvious focus upon the Senator's integrity and credibility in the issues tried mandated in my judgment a transfer of this trial outside the State of Missouri."

While the trial judge may have attempted to conduct his voir dire to elicit any prejudices the jurors might harbor, in the final analysis, it was each juror's own determination of his ability to judge the case which determined whether or not he would be excused for cause. If a juror's subjective evaluation of his partiality is insufficient to protect the defendant's right to a fair trial in an "ordinary" case [*Irvin* v. *Dowd*, 366 U.S. 717 (1961); *United States* v. *Davis*, 583 F.2d 190 (5th Cir. 1978); *United States* v. *Bear Runner*, 502 F.2d 908 (8th Cir. 1974)], it must be even less valid in an "extraordinary" case such as this one. (The panel noted in its opinion that it might also be assumed Senator Eagleton's position might cut against him with the jurors. That notion was ably answered by Chief Judge Lay on page 29).

The questions presented before the panel in this case are ones of increasing importance in the modern legal system. In recent months the word of public officials, most of whom are less popular in the forum district than Senator Eagleton, is being put to the test in the courts, as with the ABSCAM cases. The

issues of change of venue and scope of voir dire, in light of the special circumstances and the flood of publicity which accompanies these cases, are ones upon which the trial courts need guidance. Especially considering the vigorous dissent of Chief Judge Lay, this case is one which should be passed on by this Court en banc.

Conclusion

For the foregoing reasons, appellants submit they should be granted a rehearing. Alternatively, appellants submit that this case involves questions of exceptional importance which should be ruled on by the Court en banc.

Respectfully submitted,

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Attorneys for Appellants

Certificate Of Service

I, Leonard J. Frankel, Attorney for Appellants, do hereby certify that two copies of the Petition for Rehearing or, In the Alternative, For Transfer to the Court En Banc, with Suggestions in Support Thereof, have been delivered this 28th day of August, 1981, to

United States Attorney
Terry I. Adelman
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Attorneys for Appellants

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 80-2133

United States of America,
Appellee,

v.

Stephen Poludniak,
Appellant.

No. 80-2134

United States of America,
Appellee,

v.

Elizabeth E. Weigand,
Appellant.

Appeals from the United States District Court
for the Eastern District.

The Court, having considered appellants' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied. Judge McMillian would grant the petition for rehearing en banc.

September 14, 1981

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 80-143CR(1)

United States of America,
Plaintiff,

v.

Stephen Poludniak

and

Elizabeth E. Weigand,
Defendants.

Defendants' Proposed Questions For Individual Voir Dire Examination

1. Do you generally vote in the national election?

2. Did you vote in the last primary? If so, which political party's ballot did you choose?

3. Do you belong to any political group or organization? Pay dues, hold office, attend meetings?

4. Have you ever taken an active part in any political organization or campaign? If so, explain.

5. Have you ever worked for the Democratic Party? For Thomas Eagleton? Pass out literature, fund raising, canvassing?

6. Have you ever contributed to the Democratic Party? To Thomas Eagleton?

7. Have you ever attended any function where Senator Eagleton was present? If so, explain.

8. Have you, or any member of your family, ever requested assistance from Senator Eagleton or his staff?

9. If Senator Eagleton were to testify in this trial, would you give any greater weight to his testimony than any other witness?

• • •

1. What is your religious preference?

2. Do you attend church or temple regularly?

3. Do you believe that each person has the right to participate in any religious group or organization they desire to?

• • •

1. Do you usually read the newspaper? Which ones?

2. Do you watch television news? Which station?

3. Do you listen to radio news? Which station?

4. Have you heard or read anything about this case before you came here for jury duty?

5. Is there anything you have heard or read which would lead you to feel that you have an opinion on this case one way or the other?

6. What have you heard or read about this case? (If Church of Scientology mentioned, then:

a. The Church of Scientology is not a party to this case. The fact that the defendants may have a relationship to the Church of Scientology is not relevant to any of the issues involved in this case. Will the membership of defendants in the Church of

Scientology influence your decision as a juror in this case in any way?

b. How do you feel about the Church of Scientology?

c. Can you set aside any feelings you may have regarding the Church of Scientology and judge this case solely on the evidence presented and the instructions of law given you at the end of the case?)

7. Do you have an opinion on this case? Can you set aside whatever opinion you may have formed and judge this case solely on the evidence presented and the instructions of law given you at the end of this case?

APPENDIX E

"Defendant Elizabeth Weigand claims that she is not guilty of willful wrongdoing because she acted on the basis of advice from her attorney, defendant Stephen Poludniak.

If Elizabeth Weigand, prior to July 25, 1980, sought the advice of an attorney whom she considered competent, in good faith for the purpose of effecting a buy-out of her interest in Missouri Pipefittings Company, and made a report to her attorney of all material facts known to her, and she thereafter acted strictly in accordance with the advice of her attorney, then Elizabeth Weigand could not be willfully doing wrong in doing something the law forbids, as the term willfully is used in these instructions.

Whether Elizabeth Weigand acted in good faith in seeking the advice of an attorney and whether she made a report to her attorney of all material facts known to her, and whether she thereafter acted strictly in accordance with the advice received, are questions for you to determine."

APPENDIX F

The defendant Weigand claims that she is not guilty of willful wrongdoing because she acted on the basis of advice from her attorney.

Advice of counsel is not a defense to the crimes of conspiracy or extortion. It is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked specific intent to violate the law.

If the defendant before taking any action sought the advice of an attorney whom she considered competent, in good faith, and for the purpose of securing advice on the lawfulness of her possible future conduct and made a full and accurate report to her attorney of all material facts of which she has the means, and knowledge and acted strictly in accordance with the advice of her attorney given following her full report, then the defendant would not be willfully doing wrong in doing something the law forbids, as that term is used in these instructions.

Whether the defendant acted in good faith for the purpose of seeking guidance as to the questions about which she was in doubt, and whether she made a full and complete report to her attorney, and whether she acted strictly in accordance with the advice received are questions for you to determine.

Advice of counsel does not under all circumstances confer complete immunity on a defendant. If this were the law a defendant could insulate herself from prosecution by having a lawyer tell her that a particular course of conduct was legal, no matter how violative of the law that conduct was and regardless of the consciousness of wrongdoing or unlawfulness on the defendant's part and on her lawyer's part. No such legal doctrine exists. No one can willfully and knowingly violate the law and excuse herself from the consequences by claiming that she followed advice of counsel.

APPENDIX G

October 27, 1980

Leonard J. Frankel, Attorney
8019 Forsyth
St. Louis, Missouri

Dear Sir:

I was on the jury for Libby Weigand and I was emotionally exhausted from the experience and still feel depressed for this verdict of guilty. All during the trial I kept thinking of ways this could have been prevented — If Tom Eagleton could have taken more time to counsel Libby. If Thyson could have been more kindly. Perhaps she *could* have been bought out for $100,000 over a five year span by Tom or Thyson with the approval of the other stockholders. I kept trying to figure out why this happened. I found it difficult to believe this pretty young woman would to these unscrupulous things. But, out of frustration, revenge, greed or stupidity, the acts were committed. And stupidity is the point made for Poludniak but — Libby seemed much more simple and impressionable and a very young woman at that, even tho she came back from California willing to go along with the evil plan — it is *possible* that in the 2 or 3 days from the phone call to California until the meeting at the Missouri Athletic Club that she *did not* realize that she was committing a crime.

That is why I am writing to you. It is Monday now, 3 days since the verdict was reached. I am a very slow person and this possibility did not come clear to me. I do not recall it being argued. Poludniak — a teacher of law — an honor student — had to know it was a crime. It was not possible to believe he did not know extortion is a crime. But Libby may not have known.

I wish somehow that Tom Eagleton could forgive her and realize that in his youth he too may have done some bad & foolish things and I hope that Judge Wangelin will be gentle in his sentencing of Libby for certainly she was ill advised.

Sincerely,

June Gengler

Opposition

Office - Supreme Court, U.S.
FILED
JAN 8 1982
ALEXANDER L. STEVAS

No. 81-901

In the Supreme Court of the United States

OCTOBER TERM, 1981

ELIZABETH E. WEIGAND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was entitled to a change of venue on the basis of pretrial publicity.

2. Whether the district court abused its discretion in conducting voir dire of the jury.

3. Whether the presiding judge should have recused himself.

4. Whether three defamatory reports written by petitioner to extort money from her family's business should have been excluded on the ground of undue prejudice.

5. Whether the district court's jury instruction concerning petitioner's reliance on advice of counsel was error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-30) is reported at 657 F. 2d 948.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 1981. A petition for rehearing was denied on September 14, 1981 (Pet. App. A-40). The petition for a writ of certiorari was filed on November 12, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted of extortion by telephone, in violation of 18 U.S.C. 875(d), and of conspiracy to commit the substantive offense, in violation of 18 U.S.C. 371. She was committed to the custody of the Attorney General pursuant to the Federal

Youth Corrections Act, 18 U.S.C. 5005 *et seq.* The court of appeals affirmed, with Chief Judge Lay dissenting on the ground that petitioner's motion for a change of venue should have been granted (Pet. App. A).

Petitioner is the niece of Senator Thomas Eagleton of Missouri (Tr. 566). Both are shareholders in the Missouri Pipe Fittings Company, a business owned by the Eagleton family. The company has a restrictive stock agreement that permits a shareholder to sell his stock only to another member of the Eagleton family, to the corporation, or, with the consent of 60% of the shareholders, to a third party (Tr. 226-231). Petitioner wanted to sell her interest to the corporation, but in January 1980, she was advised by the managing director of Missouri Pipe Fittings, J.J. Thyson, that the corporation would not buy her shares (Tr. 234-248, 571-574). Over the next few months, petitioner requested that Senator Eagleton convince Thyson to accept her offer. The Senator refused, however, reminding petitioner that a large portion of the profits were needed to pay the medical expenses of her father, who was confined to a nursing home since he suffered a stroke in 1973. Purchase of her interest would have jeopardized the corporation's ability to provide for his care (Tr. 573-580).

After discharging a lawyer who advised her that the stock agreement was a well-drafted document and that she could not afford to litigate with the company (Pet. App. A-3 to A-4), petitioner enlisted the help of her friend and co-defendant, Stephen Poludniak, an attorney, to sell her interest. Together, petitioner and Poludniak embarked on a scheme to force the corporation to buy her out by threatening to issue defamatory statements about the management of the company and about Senator Eagleton, who was running for reelection. For instance, while visiting Key West, Florida, petitioner's sister had heard a rumor charging Senator Eagleton with personal misconduct. On July

10, 1980, petitioner wrote a letter to the Senator in which she referred to "Key West." She and Poludniak hoped this reference would provoke a response from the Senator (Pet. App. A-4 to A-5; Tr. 576-579, 837-841, 884-886).

Poludniak also engaged in negotiations with Thyson and William Buckley, an attorney for the corporation, to sell petitioner's interest. In conversations with company representatives, Poludniak threatened to release damaging information about the Senator to the press if the corporation refused to meet their demands. He also told Buckley that petitioner had hired private investigators to gather information detrimental to the Senator. Buckley asked Poludniak to elaborate on the nature of the damaging information and told Poludniak that the only reason the corporation was willing to negotiate was to prevent its publication. Poludniak refused to be specific, referring only to "Key West" and speaking generally about alleged financial and political improprieties (Pet. App. A-5 to A-6; Tr. 250-254, 433-457, 470-482; Gov't Exhs. 4A-6A).

Poludniak and Buckley met again on August 1, 1980. During the meeting Buckley telephoned petitioner and agreed to buy out her interest in the corporation for $220,000 in exchange for her delivering to him all damaging information that she had against the Senator (Pet. App. A-6 to A-8). A meeting was arranged for August 3, at which time the transaction was to be consummated (Tr. 255-262, 483-495; Gov't Exhs. 7A, 8A). Petitioner and Poludniak arrived at the meeting with a sealed envelope, and Buckley and Thyson carried a $220,000 check. Petitioner refused to permit them to examine the contents of the envelope prior to receiving the check. Buckley and Thyson would not deliver the check until they saw the envelope's contents; consequently, petitioner and Poludniak left with the envelope but without completing the sale (Tr. 264-265, 483-498; Gov't Exh. 9A). As they left the meeting, petitioner and

Poludniak were arrested by FBI agents, who seized the envelope. It contained three reports in petitioner's handwriting: one alleged that Senator Eagleton had engaged in personal misconduct in Key West; one concerned alleged mismanagement of the corporation; and one alleged illegal campaign contributions. All three were false (Pet. App. A-9; Tr. 584-587; Gov't Exhs. 27A-C).

Testifying in her own behalf, petitioner admitted that she intended to induce the corporation to purchase her interest by threatening to disseminate information that would damage Senator Eagleton's bid for renomination in the August 5, 1980 primary election. She said, however, that Poludniak had advised her that blackmail was not illegal and that she relied upon his advice (Tr. 894-896, 911-912).[1]

ARGUMENT

The decision below turns on the application of settled law to the particular facts of this case and raises no question warranting this Court's review. The issues raised by the petition concern matters properly entrusted to the broad discretion of the district court, and they were fully considered and correctly decided by the court of appeals. Accordingly, the petition should be denied.

1. Petitioner contends (Pet. 11-15) that she was entitled to a change of venue due to the publicity that resulted from Senator Eagleton's involvement in the case, and his impending bid for reelection.[2] But publicity alone will not entitle a defendant to a change of venue unless it will deprive him of a fair and impartial trial. Fed. R. Crim. P. 21(a). Moreover,

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[1]Petitioner and Poludniak were tried jointly. Poludniak was found guilty and sentenced to four years' imprisonment on Count II; sentence was suspended on Count I (Pet. App. A-10).

[2]We note the ironic nature of this claim. Petitioner purposefully exploited the Senator's status as a public figure and the timing of the primary election in her attempt to extort a purchase of her shares.

the jurors need not be totally ignorant of the facts and issues involved. See *Murphy* v. *Florida*, 421 U.S. 794, 800 (1975).

The trial court conducted an extensive voir dire to ensure the impartiality of the jury. This questioning revealed that most prospective jurors were unbiased. Of the 79 panel members, most had heard of the case but could not remember any details, had not formed an opinion about petitioner's guilt, and were willing to listen to the evidence with an open mind (Tr. 14-78). The prospective jurors were also questioned about their membership in political organizations, whether they had ever campaigned for or aganist Senator Eagleton, and whether they would credit his testimony more than the testimony of other witnesses (Tr. 83-183). Thus, any potential bias was fully explored, and the parties were able to select an untainted jury.

Today, many criminal prosecutions attract wide press coverage. But here, the record shows that the jury was not contaminated by the publicity, so as to deprive petitioner of a fair trial. See *Murphy* v. *Florida, supra*, 421 U.S. at 803; *Holt* v. *United States*, 218 U.S. 245, 251 (1910). Thus, the district court did not abuse its discretion in denying petitioner a change of venue. See *United States* v. *Gorel*, 622 F. 2d 100, 103 (5th Cir. 1979); *United States* v. *Lamb*, 575 F. 2d 1310, 1315 (10th Cir.), cert. denied, 439 U.S. 854 (1978); *United States* v. *Gullion*, 575 F. 2d 26, 28 (1st Cir. 1978).[3]

2. Petitioner's claim (Pet. 18-25) that the voir dire of prospective jurors on the topics of pretrial publicity and politics was too limited is groundless. The trial court asked

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[3]Chief Judge Lay's dissent on this issue is simply a reassessment of the particular facts of this case (see Pet. App. A-28 to A-29). While the dissenting opinion would have found an abuse of discretion in denying the motion for a change of venue, its fact-laden analysis presents no question warranting review by this Court.

each juror whether he or she had read or heard anything about the case, and to name the source of the information. The court further asked whether the juror had formed an opinion about petitioner and whether the juror could try the case solely on the evidence presented in the courtroom (Tr. 11-80). It then questioned the jurors extensively about their knowledge and opinions of Senator Eagleton (Tr. 81-184). The court also determined whether each juror would give special weight to the Senator's testimony (*ibid.*). Thus, adequate attention was devoted to the issues of publicity and of Senator Eagleton's reputation; the benefit of further questioning would have been de minimis.

Petitioner also contends that the district court should not have questioned the jury about the Church of Scientology. But, as the court of appeals correctly noted, there was a possibility that reference to the Church would be made at trial (Pet. App. A-18 to A-19). Had such evidence been introduced, failure to question the jury about the Church would have "set [the stage] for a claim of error" (*id.* at A-19). Moreover, contrary to her contention in this Court, during voir dire petitioner requested that she "be allowed to individually examine [the] jurors as to * * * the scope of their knowledge regarding the Church of Scientology and where they obtained their knowledge and what their knowledge consists of * * * all in line with the questions [she] previously propounded to the Court in writing" (Tr. 203-204). In these circumstances she cannot now complain that the court should have avoided the subject. In any event, voir dire is a matter committed to the sound discretion of the district court and there was no abuse here. See *Smith* v. *United States*, 431 U.S. 291, 308 (1977); *Hamling* v. *United States*, 418 U.S. 87, 138-140 (1974).

3. Prior to trial petitioner moved to recuse every judge in the Eastern District of Missouri. In this Court she contends (Pet. 15-18) only that Chief Judge Wangelin, who presided

at her trial, should have been disqualified. These claims are based solely on an article that appeared in a local newspaper three weeks before trial reporting that Judge Wangelin, as chief judge of the district court, planned to speak to Missouri's senators to request increased security at the court house. The recent escape of a convicted murderer at the court house had prompted his concern for augmented security. This incident could not reasonably call into question the impartiality of the judges in the Eastern District of Missouri. See 28 U.S.C. 455(a). Hence, the court below correctly concluded that there was no error in Judge Wangelin's refusal to recuse himself. As the court of appeals stated, court house security is Chief Judge Wangelin's responsibility, and he must rely on Congress for money (Pet. App. A-12 to A-13). The mere fact that Congress funds the judiciary does not disqualify all federal judges from presiding at cases involving legislators. Furthermore, since Senator Eagleton was not a party to the litigation, the prospect of impartiality was too remote to warrant Chief Judge Wangelin's recusal.

4. Petitioner argues (Pet. 25-27) that the three notes or reports she promised to deliver to Buckley in exchange for $220,000 should not have been admitted in evidence at trial because their prejudicial impact outweighed their probative value. See Fed. R. Evid. 403. This claim is without merit. The notes were concrete proof of her threat to defame Senator Eagleton. Moreover, these notes, which petitioner admitted were written in her own hand and were false, were relevant and highly probative of a key issue at trial—petitioner's intent. Indeed, petitioner made the issue of her intent the cornerstone of her defense; she contended that her actions were all taken upon the advice of counsel. In addition, the notes served to clarify other evidence at trial. Had the notes containing allegations of personal misconduct not been received into evidence, petitioner's cryptic reference to "Key West" in her earlier communications with

Eagleton and Buckley would not have been explained. Certainly the jury was entitled to see those items that petitioner had used to extort a purchase of her shares.

5. At trial petitioner testified that before the August 3 meeting, her husband asked Poludniak if their actions were legal. Poludniak responded that "everything is legal * * * including blackmail" (Tr. 895). Since petitioner claimed that she acted on the advice of counsel, the court instructed the jury (Pet. App. A-45) as follows:

> Advice of counsel is not a defense to the crimes of conspiracy or extortion. It is only a circumstance that may be considered in determining whether the defendant acted in good faith and lacked specific intent to violate the law.
>
> If the defendant before taking any action sought the advice of an attorney whom she considered competent, in good faith, and for the purpose of securing advice on the lawfulness of her possible future conduct and made a full and accurate report to her attorney of all material facts of which she has the means, and knowledge and acted strictly in accordance with the advice of her attorney given following her full report, then the defendant would not be willfully doing wrong in doing something the law forbids, as that term is used in these instructions.
>
> * * * * *
>
> Advice of counsel does not under all circumstances confer complete immunity on a defendant. If this were the law a defendant could insulate herself from prosecution by having a lawyer tell her that a particular course of conduct was legal, no matter how violative of the law that conduct was and regardless of the consciousness of wrongdoing or unlawfulness on the defendant's part and on her lawyer's part. No such

> legal doctrine exists. No one can willfully and knowingly violate the law and excuse herself from the consequences by claiming that she followed advice of counsel.

Petitioner contends (Pet. 28-30) that the court should have charged the jury that reliance on advice of counsel is a defense to the crime charged. We submit that the above instruction correctly states the law and, indeed, was overly generous to petitioner.

Generally, advice of counsel instructions may be appropriate only in cases involving crimes like income tax, securities, and copyright violations, where the law is sufficiently complicated that the layman may not be aware that his conduct is prohibited. See, *e.g.*, *United States* v. *King*, 560 F. 2d 122, 132 (2d Cir.), cert. denied, 434 U.S. 925 (1977); *United States* v. *Taxe*, 540 F. 2d 961, 969 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); cf. *United States* v. *Irwin*, 593 F. 2d 138 (1st Cir. 1979); *United States* v. *Powell*, 513 F. 2d 1249, 1250-1251 (8th Cir.), cert. denied, 423 U.S. 953 (1975). But blackmail, like murder, robbery, or rape, is so commonly understood to be a crime that it is folly to suppose that anyone would seriously inquire whether it is legal. This Court has upheld a charge that stated " 'no man can willfully and knowingly violate the law and excuse himself from the consequences thereof by pleading that he followed the advice of counsel.' " *Williamson* v. *United States*, 207 U.S. 425, 453 (1908).

Where the attorney is a co-conspirator and participant in the offense, he is no longer an advisor, but a partner in crime. And, as the evidence shows, petitioner did not seek the advice—her husband did—and not until the eleventh hour, when the extortion scheme was all but complete. Hence, an advice of counsel instruction was not warranted. In any event, as petitioner acknowledges (Pet. 29), the instruction given has been approved by the Ninth Circuit in

United States v. *Taxe, supra.* The instruction adequately conveyed that good faith reliance on advice of counsel will negate willfulness. Accordingly, the court of appeals was manifestly correct in upholding the trial court's charge.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1982

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